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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1496

FRANK R. MADERA, Petitioner

v.

BROOKLYN BAR ASSOCIATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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May 5, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No._____

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FRANK R. MADERA, Petitioner

v.

BROOKLYN BAR ASSOCIATION, Respondent

_____

PETITION FOR A WRIT
OF CERTIORARI TO THE
COURT OF APPEALS OF
THE STATE OF NEW YORK

_____

The petitioner, Frank R. Madera, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York (which, in the dispositional provision thereof, employs the term, "ORDERED"), entered

in this proceedings on December 6, 1972*.

The judgment - which is reported at 31 New York 2nd 875 (2 entries), 340 N.Y.S.2d. ( ), and appears in the Appendix (being submitted under separate cover) pgs. A-1 to A-2 - first (this is not sought to be reviewed) denies Madera's motion for a stay of the effect of the order of disbarment (entered by the Supreme Court of the State of New York, Appellate Division, First Department) pending his appeal from said order, taken to the Court of Appeals, as of right, on constitutional questions. New York Civil Practice Law and Rules (McKinney's Consol. Laws of New York, Ann.; Book 7B) 5601 (a)(b)(1). It then, on the (this is sought to be reviewed), court's own motion /dismisses

*The time to file this petition, as more fully explained below, was extended by Hon. Thurgood Marshall, an Associate Justice of this Court, to and including May 5, 1973.

es Madera's appeal "upon the ground that no substantial constitutional question is directly involved."

OPINION BELOW

No opinion was rendered by the Court of Appeals of the State of New York in handing down the judgment referred to. However, the court which made the order of disbarment from which MADERA appealed to the Court of Appeals of the State of New York -- namely, the Supreme Court of the State of New York, Appellate Division, Second Department -- did render an opinion in making said order of disbarment. Said opinion -- which is reported at 39 A.D. 2d 202, 333 N.Y.S. 2d 329,-- appears in the Appendix (A-132 to A-139).

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered and filed on December 6, 1972. On February 27, 1973, Hon. Thurgood Marshall, an Associate Justice of this Court, extended MADERA's time to file a petition for a writ of certiorari to and including the 5th day of May, 1973. This petition for a writ of certiorari is being filed within the period of said extension, on May 5, 1973.

This Court's jurisdiction is invoked under 28 U.S.C.,sec. 1257(3), on the ground that the judgment of the Court of Appeals of the State of New York-the court of last resort of said state -- dismissing Madera's appeal to that court on the ground of the alleged absence of a substantial constitutional question, amounts to an affirmance of the order

of disbarment. Tumey v. Ohio, 273 U.S. 510, 515; Matthews v. Huwe, 269 U.S. 262; Stern & Gressman, Supreme Court Practice (5th ed, 1969), sec. 323, p. 115.

QUESTIONS PRESENTED

1. Is an attorney, who in a disciplinary proceeding is charged with conduct which also constitute crimes, coerced into surrendering his Fifth Amendment right to remain silent as to said charges - contrary to Spevack v. Klein, 385 U.S. 511, Zuckerman v. Greason, 386 U.S. 15, citing Spevack v. Klein, supra: Garrity v. New Jersey, 385 U.S. 493, citing Spevack v. Klein, at p. 497; Gardner v. Broderick, 392 U.S. 273, citing Spevack v. Klein, supra, at pp. 276, 277, 279; Uniformed Sanitation Mens Ass'n. Inc. v. Commissioner of Sanitation of City of New York, 392 U.S., 284-285, citing Garrity, supra at pp. 384-385, and Gardner, supra at pp. 283, 284 and 285, and see concurring opinion of Mr. Justice

Harlan, citing Spevack v. Klein, supra, at p.285_ where ,at the court-ordered hearings on said charges, the bar association (prosecuting said charges), without having presented any evidence as to said charges, requests the attorney to take the stand for the purpose of giving evidence as to said charges, notwithstanding the fact that the attorney has previously indicated to the bar association, and in writing, that he will claim the Fifth Amendment with respect to said charges, and before there is a response to the bar association's request, the judicial officer presiding at the hearings advises the attorney's counsel that while the attorney may claim the Fifth Amendment, and cannot be disbarred or otherwise disciplined for

doing so, nevertheless, if he does so, "he will suffer the other consequences of the assertion of the privilege", and thereafter the attorney, faced with the choice of either asserting the Fifth Amendment and being found guilty of the charges for doing so, or testifying and being found guilty, anyway, because of his testimony, elects, under constraint of the presiding officer's ruling and threat, to testify as to said charges, does so, and is thereafter found guilty by the court (which ordered the hearings) of said charges, and is disbarred because of said fact? Do the foregoing circumstances demonstrate that the attorney was coerced into surrendering his Fifth Amendment right to remain silent as to said charges - on which no

evidence had been presented - contrary to the authorities enumerated above?

2. Is an order of disbarment in conflict with the holding of this court in Standard Oil Company of Indiana v. State of Missouri, etc. 224 U.S. 270,281, cited; Shelley v. Kraemer, 334 U.S. 1,16, note 15, as well as the holding of this court in Fayerweather v. Ritch 195 U.S. 276, 297 - forbidding as being in violation of the due process clause of the Fourteenth Amendment, the granting, in a final order or judgment, of relief which does not correspond to that which has been both heard and determined - where, on the one hand, the decision disbarring the attorney recites that it does so

because of his guilt of five (5) charges (of the seven (7) which were heard),but is silent as to the remaining two (2) charges, while, on the other hand, the order of disbarment, which purports to correspond to the decision, recites that it finds the attorney guilty of all seven (7) charges which were heard, and directs disbarment on that ground? Has the attorney been deprived of the right to have the relief granted in a final order or judgment restricted to that which has been both heard and determined on the notice which he received?

3. Is an attorney subjected to invidious discrimination, contrary to the equal protection clause and due process clause of the Fourteenth Amendment, as well as the rationale

of such holdings by the Court as Griffin v. Illinois, 351 U.S. 12, 18, Williams v. Oklahoma City, 359 U.S. 458, 459-460, and Boddie v. Connecticut, 401 U.S. 371, 374-375, 384, and Vitarelli v. Seaton, 359 U.S. 535, 539-540 (holding that a government agency is bound by its own rules and regulations), where, in a geographical area in which thousands of attorneys have practiced and still practice, the court having original and exclusive jurisdiction over charges against attorneys has for many years made it a practice, prior to permitting the filing with the court of charges against an attorney, to subject the charges to a preliminary investigation by the grievance committee of the local bar association, the latter acting as an arm of the court, and thus as a quasi-

judicial body, and such investigation, as prescribed by the by-laws of the association, includes the service of formal written charges and adversary hearings, which are in the nature of judicial proceedings, following which - and only which - the grievance committee may then recommend to the association the filing of charges with the court, nevertheless, notwithstanding all the foregoing, in the case of the attorney of whom we are speaking, none of these rights or procedures were accorded to him, but, instead, charges against him were, in the first instance, filed with the court, and the court also denied the attorney's request that the said charges be subjected to the said preliminary investigation, and there was no rational basis for, nor any compelling state interest underlying, the denial to the attorney of said rights and procedures, and proceeding

as the bar association and court did? Has the attorney been denied the equal protection of the laws and due process vouchsafed by the Fourteenth Amendment?

4. Is an order of disbarment in conflict with the holding of this court in Johnson v. Mississippi, 403 U.S. 212-216 - holding that a party to a judicial proceeding (which includes quasi-judicial proceedings) is entitled to an impartial judge - where,prior to the filings of charges with the court against said attorney, the Chairman of the Grievance Committee of the local bar association, following the agreement by said attorney to pay a complainant in installments, a sum of money in satisfaction of the complainant's claims, the installments successively fall into arrears, the said Chairman, acting as a de facto ad hoc attorney for the com-

plainant, as each installment falls into arrears, demands and receives from said attorney payment of each installment, and thereafter the Chairman, as a member of the Grievance Committee - which is an arm of the court having jurisdiction over charges against attorney, and thus a quasi-judicial body - votes, purportedly according to the association's by-laws (but without the previous service of formal written charges or adversary hearings. See facts stated in question "3" directly above), to recommend to the association the filing with the court of charges against the attorney, including the matters reflected in the said settlement, and thereafter also testifies at the court-ordered hearings as a witness for the bar association concerning said matters and said collection efforts? Has the attorney been denied due process?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved - which are set forth in the Appendix of Statutes annexed hereto - are New York Judiciary Law, sec. 90 (2)(4)(6), and (9), and New York Penal Law, secs. 155.05, 185.05, 185.10 and 190.05.

STATEMENT OF CASE

At the time the disciplinary proceedings involved herein were commenced (January, 1971), petitioner herein, Frank R. Madera, was, and had been since 1939, an attorney admitted to practice in the courts of the State of New York (A-23*). He maintained offices for the practice of law in the Borough of Brooklyn, City of New York (A-23). That Borough is part of the Second Judicial Department of the State of New York (also referred to as the Second Department). New York Judiciary Law (McKinney's Consol. Laws of New York, Book 29) Sections 70 and 140.

The Appellate Division of the Supreme Court in said Department-

*Numbers, preceded by "A", unless otherwise indicated, refer to pages of petitioner's Appendix.

one of four in the State,one for each Department (New York Judiciary Law, Sections 70, 71, 75) - has original and exclusive jurisdiction over (a) complaints or charges against attorneys practicing in said Department,of professional misconduct, malpractice, fraud, deceit, crime, misdeamenor or conduct prejudicial to the administration of justice,and (b) the imposition of discipline for same. New York Judiciary Law, Section 90 (2).

The Brooklyn Bar Association ("Bar Association") is authorized to prosecute such charges against attorneys practicing in said Department by filing a petition containing such charges - after first serving the attorney - with the Appellate Division of the Second Department. New York Judiciary Law,

Section 90, subd. 8, to be read with subds. 2 and 6.

In January 1971, the Bar Association, as petitioner, filed with said Appellate Division - after first serving petitioner - a petition specifying charges against Madera, as respondent, together with a notice of motion, requesting that the court take "such action in respect of the respondent as is contemplated by law" (A-21).

The charges were seven (7) in number, based upon complaints made by four (4) complainants, and were grouped into four (4) categories - one for each complainant's charge or charges - and were labeled "I", "II", "III", and "IV", respectively (A-25, A-26, A-29, A-31). Each of the charges, as described more fully below, also alleges crimes.

In response to the notice of motion and petition, Madera filed an answer, denying the charges (A-37 to A-38)* Pursuant to statute (New York Judiciary Law, Sec. 90, subd. 9) and long-settled practice, the Appellate Division ordered a reference, designating Hon. Bertram Wegman, a Justice of the Supreme Court of the County of Kings - a court directly below said Appellate Division (New York Judiciary Law, Sec. 71) - to act in effect as Referee, for

*At the same time, Madera also filed a cross-motion (A-41 to A-49; see, also, A-50 to A-63, and A-64 to A-69) - which was later denied - asking that the charges be referred back to the Bar Association, for a preliminary investigation, in accordance with the long settled practice. 1 Carmody-Wait, Cyclopedia of New York Practice, With Forms (2nd Ed), section 3:212, pp.562-563; Weiner v. Weintraub, 22 N.Y. 2d 330, 292 N.Y.S. 2d 667, to be read with Bar Association By-Laws (A-4 to A-7).

(Footnote continued on next page)

the purpose of hearing and reporting, with his findings, on the issues raised by the charges and Madera's answer and denials (A-74 to A-79).

Thereafter Mr. Justice Wegman, acting as Referee, held hearings on the charges (A-80 to A-110). The Bar Association and Madera each appeared by counsel, the former by Marshall G. Kaplan, Esq., and the latter by Joseph Slavin, Esq. (A-80 to A-81).

Mr. Justice Wegman's Coercion Of Madera Into Surrendering His Fifth Amendment Right To Remain Silent As To Charges Constituting Crimes, on Which, Moreover, No Evidence Had Been Presented.

Such a preliminary investigation, which includes adversary hearings which are in the nature of judicial proceedings (Weiner v. Weintraub, supra) had never been held. The failure to do so gives rise to constitutional questions presented in this petition.

After presenting evidence as to only three (3) of the seven (7) charges specified in the petition, which were referred to Mr. Justice Wegman,* but without having presented any evidence as to the remaining four (4) charges, counsel for the Bar Association, Mr. Kaplan, asked Madera to take the stand, for the purpose of giving evidence as to said four (4) charges (A-251 to A-262).

Before describing the response to counsel's request, it is necessary to establish that each of the said four (4) charges also alleged crimes, as follows: (1) The charge in the petition relating

*(1) The complaint of Jacinto Febos- (Petition, A-25; transcript of hearings, pgs. 4-16, 64-95), (2) the complaint of Angelo Cortese (Petition, A-31 to A-33; transcript of hearings, pages 17 - 33); and (3) one of the three complaints of Mirtes Sobral, relating to a Myrtle Avenue property (Petition, A-26 to A-27; transcript of hearings, pp. 52-64, 106 - 152).

to 409 Bristol Street (Petition, A-27 to A-28) alleges the crime or crimes of larceny. New York Penal Law (McKinney's Consol. Laws, Book 39), Sec. 155.05 and 190.05.

(2)The charge in the petition concerning 684 President Street (Petition, A-28 to A-29) also alleges the crime or crimes of larceny. New York Penal Law, sec. 155.05.

(3) The charge in the petition relating to 472 Warren Street (A-29 to A-30) also alleges the crime or crimes of larceny, including the specific crime (of larceny) of issuing bad checks. New York Penal Law, Secs. 155.05 and 185.10.

(4) The charge in the petition relating to 270 Prospect Park West (Petition, A-30 to A-31) also alleges the crime or crimes of larceny. New York Penal Law, Sec. 155.05.

In sum, therefore, each of the four (4) charges - on which the Bar Association had presented no evidence, but requested Madera to take the stand for the purpose of furnishing evidence as to said charges -also alleged crimes. Indeed, the court and counsel for both sides recognized that fact, as well as the further fact that Madera could and might invoke the Fifth Amendment concerning said four (4) charges, with both the court and counsel for both sides making such recognition explicit in the colloquy which ensued immediately following the request that Madera take the stand (A-251 to A-263).

Evidencing such recognition during the colloquy, the court and counsel alluded to the holdings of this court in Cohen v. Hurley, 366 U.S. 117 and Spevack v. Klein, 385 U.S. 511, overruling Cohen, supra, which deal with the effect of the invocation

of the Fifth Amendment by an attorney in a disciplinary proceedings which respect to charges which also allege crimes (A-255 to A-256 with A-253 to A-257).

At virtually the very outset of the colloquy, counsel for Madera informed the court that he would need an adjournment or recess to consider the question whether Madera would testify or not concerning said four (4) charges, as the Bar Association's witness, "because I wasn't anticipating the respondent being called by the petitioner", meaning the Bar Association (A-252 to A-253).

Not only was there ample basis for the representation by Madera's counsel that he was surprised by the Bar Association's request that Madera take the stand, but the facts underlying said basis also disclose that the Bar Association's request was made in the

face of Madera's previous statement in writing to the Association that he would assert his Fifth Amendment privilege with respect to said four (4) charges (as well as with respect to other charges). More particularly, prior to the filing by the Bar Association with the Appellate Division of its petition specifying charges against Madera, the latter addressed a letter to the Association's Grievance Committee (A-14 to A-19). That letter was written in response to (a) a notice of a meeting to be held by the Grievance Committee on the certain complaints against Madera, some of which subsequently became the charges specified in the Bar Association's petition herein, and (b) in response to a subpoena served upon Madera, requiring him to appear at the meeting, produce his files concerning certain named complainants set forth in a list

attached to the notice of the meeting (A-8 to A-13). In that letter - as Mr. Justice Wegman was advised at the said hearing (A-301 to A-307). Madera, citing Spevack v. Klein 385 U.S. 511, supra, stated that he would invoke the Fifth Amendment with respect to the matters of the complainants who were enumerated in the list attached to the notice of the meeting;* that with respect to the files, he would do likewise, except for one file relating to a contingent fee matter, which he would and did deliver to the Grievance Committee (in accordance with the rule relating to such matters dealt with in Spevack v. Klein, 385 U.S., at p. 516, note 4), and, finally, that the letter

*Even the three (3) other complaints which later became the three (3) other charges in the petition on which the Bar Association would present evidence at the hearings before Mr. Justice Wegman, also, in each instance, alleged the crime or crimes of larceny. New York

(footnote continued on next page)

could be made part of the record of the meeting, as if he had appeared thereat, been asked to testify and produce records, and had asserted his Fifth Amendment privilege.

Thus, it appears that the Bar Association's request at the hearings that Madera take the stand to furnish evidence concerning the four (4) charges on which it had presented no evidence, was made in the face of Madera's previous statement, in writing, to the Bar Association that he would invoke the Fifth Amendment concerning said charges. It thus also appears that counsel for Madera had ample reason for requesting an adjournment or recess to determine whether Madera should testify for the Bar Association, "because I wasn't anticipating the respondent being called by the petitioner (A-252 to A-253).

Penal Law, Sec. 155.05

When Madera's counsel made his request for an adjournment or recess for said purpose, the court addressed him as follows: (A-253, A-54)

> "Well, of course,you know the rule on that...He has an absolute right to claim the privilege, but he does not have the right to have any favorable inferences drawn from it...In other words, he cannot be disbarred or otherwise disciplined for claiming the Fifth Amendment, but he will suffer the other consequences of the assertion of the privileges." (sic).

It is respectfully submitted that Mr. Justice Wegman's ruling - and, if we may say so, threat - had only one meaning, namely, that if Madera claimed his Fifth Amendment privilege and declined to

testify concerning the said four (4) charges - on which, incidentally, the Bar Association had offered no evidence - he, Mr. Justice Wegman, would draw the inference that Madera was guilty of said charges, notwithstanding the fact that, no evidence had been presented concerning same, and/if the further fact that Madera invoked his constitutional privilege and remained silent, there would, of course, still be no evidence concerning said charges.

The effect of Mr. Justice Wegman's ruling and threat, was, as could be expected, to exert upon Madera, in the form of impressive and, indeed, awesome judicial authority, impermissable coercion for the purpose of persuading Madera, under constraint of said ruling and threat,to surrender his Fifth Amendment right to remain silent (Spevack v. Klein,385 U.S. 511), and to furnish evidence on the charges in question.

Zuckerman v. Greason, 386 U.S. 15, citing Spevack v. Klein, supra, Garrity v. New Jersey, 385 U.S. 493, citing Spevack v. Klein, supra, at p. 497; Gardner v. Broderick, 392 U.S. 273, citing Spevack v. Klein, supra, at pp. 276, 277, and see also p. 279; Uniformed Sanitation Mens Ass'n Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280, 284-285, citing Garrity v. New Jersey, supra, at p. 284-285, and Gardner v. Broderick supra at pgs. 283, 284 and 285; and see concurring opinion of Mr. Justice Harlan, citing Spevack v. Klein, supra, at p. 285. And that is precisely what happened. Faced with the Hobson's choice of either (a) claiming his constitutional right to remain silent, and having Mr. Justice Wegman, as he unmistakably suggested /he would, conclude that he (Madera) was guilty of the said four (4) charges

(notwithstanding the fact that no evidence had been presented), or (b) furnishing evidence concerning said charges, and risking the possibility of being found guilty of said charges anyway, because of said evidence, Madera elected to testify, under constraint of Mr.Justice Wegman's ruling and threat to draw the inference,if Madera asserted his Fifth Amendment privilege, that he was guilty of said charges.(A-264, et. seq., as explained directly below).

Madera's testimony concerning said four (4) charges appears in the transcript of the hearing, as follows:

(1) The charge in the petition relating to 409 Bristol Street (petition, A-27 to A-28): see transcript excerpts, A-265 to A-282.

(2) The charge in the petition relating to 684 President Street (A-28 to A-29): see transcript excerpts, A-282 to A-287).

(3) The charge in the petition relating to 472 Warren Street (petition A-29 to A-30): see transcript excerpts, A-289 to A-295.

(4) The charge in the petition relating to 270 Prospect Park West (Petition A-30 to A-31): see transcript excerpts, A-295 to A-301)

The Report of Mr. Justice Wegman To The Appellate Division, Finding Only One Of The Seven (7) Charges To Have Been Sustained (Not One Of The Said Four (4) "Fifth Amendment" Charges), And Finding That The Other Six (6) Charges Had Not Been Sustained (Including the Said Four (4) "Fifth Amendment Charges).

Following the conclusion of the hearings, Mr. Justice Wegman rendered a report (A-80 to A-110) in which he found only one of the seven (7) charges to have been sustained (the Febos charge, on which the Bar Association had presented evidence; petition A-25; with Referee's report, A-82 to A-92), but found the remaining six (6) charges - including the said four (4) "Fifth Amendment" charges, on which the Bar Association had presented no evidence, except through Madera - not to have been sustained (A-92 to A-110).

The Motions Made By The Bar Association And Madera Addressed To Mr. Justice Wegman's Report

After Mr. Justice Wegman had rendered his report, and pursuant to the prevailing practice, both sides

made motions addressed to the report. The Bar Association moved to confirm that portion of the report which found the Febos charge to have been sustained, and to disaffirm those portions which found the remaining six (6) charges not to have been sustained (A-111 to A-124).

Madera cross-moved to confirm those portions of the report which found the six (6) charges not to have been sustained, and to disaffirm that portion of the report which found the Febos charge to have been sustained (A-125 to A-129).

The Order Of The Appellate Division (a) Granting The Bar Association's Motion, And Denying Madera's Cross Motion, (b) Finding all Seven (7) Charges To Have Been Sustained (Including The Four (4)"Fifth Amendment" Charges, On Which The Bar

Association Had Presented No Evidence Except Through Madera), and (c) Directing Madera's Disbarment Because Of His Guilt Of Said Seven (7) Charges

The Appellate Division thereafter made an order, (A) granting the Bar Association's Motion, and denying Madera's cross-motion, (b) finding all seven (7) charges to have been sustained (including the four (4) "Fifth Amendment" charges, on which the Bar Association had presented no evidence except through Madera, and (c) directing Madera's disbarment because of his guilt of said seven (7) charges (A-140 to A-145)*

*Elsewhere herein, we show that the order of disbarment not only fails to correspond, as it must, to the underlying decision (as limited, according to the decision itself, by the opinion), but substantively exceeds the decision,
((footnote continued on next page)

Thus, the order of disbarment directs Madera's disbarment because of his guilt of, among other charges, the said four (4) charges as to which Mr.Justice Wegman coerced Madera into surrendering his Fifth Amendment right to remain silent, in response to the Bar Association's request that he testify

in that the latter (a) found only five (5) of the seven (7) charges to have been sustained (including two (2) of the said four (4) "Fifth Amendment" charges), (b) directed Madera's disbarment because of his guilt of said five (5) charges, but (c) made no reference to the remaining two (2) charges (the other two (2) of the said four (4) "Fifth Amendment" charges), let alone passed upon or disposed of them. (see decision, A-130 to A-131, and opinion A-132 to A-139). This conflict between the order of disbarment, on the one hand, and the decision (as limited, according to the decision, by the opinion) on the other hand, is dealt with more fully below, and also gives rise to constitutional questions presented in this petition.

concerning said four (4) charges, on which, incidentally, the Bar Association had offered no evidence.

In view of these facts,the order of disbarment, to the extent that it rests, as it does,upon a finding of Madera's guilt of said four (4) charges, is in conflict with Spevack v. Klein , 385 U.S. 511, supra and the other authorities cited at pgs. supra. Since the finding of guilt of these four (4) charges, as well as the finding of guilt of the other three (3) charges, constitute a single unitary ground for the order of disbarment - namely,Madera's guilt of the seven (7) charges - it follows that the order of disbarment may not stand,but that the judgment of the Court of Appeals (A-1 to A-2), dismissing Madera's appeal from the order of disbarment, on the ground

of an absence of a substantial constitutional question, must be vacated, and the Court of Appeals directed to vacate the order of disbarment, and to direct the Appellate Division to reconsider the proceedings in the light of the remaining three (3) charges. Zuckerman v. Greason, 386 U.S. 15.

In the foregoing connection, it should be borne in mind that dismissal of the said four "Fifth Amendment" charges must necessarily affect the decision - or re-disposition - of the remaining three (3) charges, in view of the fact that all the charges turned upon the credibility of witnesses, including Madera; that each of the said four (4) charges was made by a complainant who made one or more of the remaining three (3) charges, and all the charges are essentially either similar in matter or have material common elements.

The stage in the proceedings in the court of first instance and in the appellate court, and the manner in which, the Fifth Amendment question sought to be reviewed was raised

The court of first instance in the proceedings is the Supreme Court of the State of New York, Appellate Division, Second Department (A-140 to A-145; A-20 to A-21; A-22 to A-36; A-37 to A-40; A-41 to A-70; A-70 to A-71; A-71 to A-73; A-74 to A-79).

The Fifth Amendment question sought to be reviewed was raised at the hearings before Mr. Justice Wegman -- who was appointed by said Appellate Division to hear and report, with his findings, on the issues (A-74 to A-79)

and the question was raised by Mr. Justice Wegman and counsel for both sides (A-251 to A-263).

Following the entry of the order, Madera moved in said Appellate Division to vacate the order of disbarment on the ground, among others, of the Fifth Amendment issue (A-154 to A-158). The motion was denied (A-167 to A-170).

The Fifth Amendment question was again raised in the Appellate Division by Madera's motion in said court -- made pursuant to New York Civil Practice Law and Rules (McKinney's Consol. Laws, Book 7B), 5602 (a)(1)(i) -- for leave to appeal to the Court of Appeals from the order of disbarment (A-171 to A-179), since the application was stated to be based upon all the grounds advanced on Madera's

motion to vacate the order of disbarment, one of which, as seen above, was the Fifth Amendment issue (A-177).

The Fifth Amendment question was raised by Madera in the Court of Appeals of the State of New York on his motion for a stay of the order of disbarment pending determination of his appeal, taken as of right, on federal constitutional questions (among others), from the order of disbarment, pursuant to New York Civil Practice Law and Rules (McKinney's Consol. Laws of New York, Book 7B), 5601(b)(1) (a-212 to A-222).

The irreconcilable substantive dispositional conflict between, on the one hand, the decision (as limited, according to the decision, by the opinion), and, on the other hand, the order of disbarment, which purports to correspond to the decision, but materially exceeds it in the relief granted

The decision (A-130 to A-131) refers to the seven (7) charges by the four (4) categories (one for each complainant's charge or charges, "I", "II", "III", and "IV"), by which they are alluded to in the petition (A-25 to A-33).

The decision (a) grants the Bar Association's motion (A-111 to A- 124) to confirm that portion of Mr. Justice Wegman's report which found the Febos charge (petition, A-25) to

have been sustained,and to disaffirm those portions which found the remaining six (6) charges not to have been sustained, but only "to the extent indicated in the per curiam opinion rendered herewith", and (b) denies Madera's motion (A-125 to A-129) to confirm those portions of the report which found the said six (6) charges not to have been sustained, and to disaffirm that portion of the report which found the Febos charge to have been sustained (A-130 to A-131).

The opinion (A-132 to A-139) also, like the petition and decision, refers to the seven (7) charges by the four categories, "I", "II", "III" and "IV" (A-132 to A-139).

The opinion -- which, as noted, according to the decision, limits the scope of the decision (A-131)-

-- deals, only as described below, with only five (5) of the seven (7) charges in the petition, disposes only of said five (5) charges, and finds Madera guilty of said five (5) charges, but makes no reference to--let alone disposes of--the two (2) remaining charges. More particularly, the opinion refers only to and disposes of only the following five (5) charges:

(1) The Febos charge (petition, A-25; opinion, A-131).

(2) The charge relating to 511/519 Myrtle Avenue (petition, A-27 to A-27; opinion, A-134 to A-136, except last seven lines).

(3) The charge relating to 409 Bristol Street (petition A-27 to A-28; opinion, A-136 to A-137, last seven lines, plus two words on p. 137).

(4) The charge relating to 472 Warren Street (petition; A-29 to A-30; opinion, A-137).

(5) The charge made by Albert R. Gins, in behalf of Angelo Cortese (petition A-31 to A-33; opinion, A-137 to A-138).

The two (2) charges to which the opinion does not refer -- let alone disposes of -- are (a) the charge relating to 684 President Street (petition, A-28 to A-29), and (b) the charge relating to 270 Prospect Park West (petition, A-30 to A-31).

That the opinion disposes only of the said five (5) charges, but not of said two (2) remaining charges, is further confirmed by the fact that the opinion states that the Bar Association's motion (to confirm and disaffirm, respectively, those portions of the report in favor of the Bar Association, and adverse to it) "to the extent indicated herein", at the same time denying Madera's motion to confirm and disaffirm (A-138).

From all of the foregoing, we see that the decision states that the Bar Association's motion (to confirm and disaffirm) is granted "to the extent indicated in the per curiam opinion rendered herein" (A-131), and that the opinion, which itself states that the Bar Association's motion "is granted to the extent indicated herein" (A-138), refers only to five (5) of the seven (7) charges, finds those five (5) charges to have been sustained, and directs Madera's disbarment because of his guilt of said five (5) charges (A-132 to A-139). At the same time, the opinion says nothing about the two (2) remaining charges, and, of course, does not dispose of them.

The order of disbarment, like the petition, decision and opinion, also refers to the seven (7) charges by the

four categories, "I", "II", "III", and "IV" (A-142). It also recites that the order is based "upon the decision and the per curiam opinion of the Court herein, dated June 14, 1972, heretofore filed and made a part hereof" (A-143).

The order of disbarment, however, which purports to correspond, as it must, to the decision, as limited, according to the decision, by the opinion, not only does not correspond to the decision, but exceeds it in a substantive material respect, in that it grants relief which is not granted in either the decision or opinion. More particularly, the order of disbarment finds all charges in the petition (seven in number) to have been sustained, and directs Madera's disbarment because of his guilt of seven (7) charges. As already noted, however, the decision --

as limited, according to the decision, by the opinion -- refers to only five (5) of the seven (7) charges, finds these five (5) to have been sustained, and directs Madera's disbarment because of his guilt of said five (5) charges. As already noted, the decision, as limited by the opinion, does not dispose of the remaining two (2) charges.

By reason of the foregoing facts, the order of disbarment is in conflict with the holding of this Court in Standard Oil Company of Indiana v. State of Missouri, etc., 224 U.S. 270, 281, cited, Shelley v. Kraemer, 334 U.S. 1, 16, note 15, and the holding of this Court in Fayerweather v. Ritch, 195 U.S. 276, 297. Standard Oil Company of Indiana, supra, holds that the relief granted in a final order or judgment, to be consistent with the due process clause of the Fourteenth

Amendment, must correspond to and be appropriate to that which has been both heard and determined [emphasis supplied]. That means that relief granted in a final order or judgment which does not correspond to, nor is appropriate to, that which has been both heard and determined, must be stricken as being in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States. This is because the relief granted, in order to be consistent with said due process clause, must correspond to and be appropriate to that which has been both heard and determined on notice to the unsuccessful party. While it is true that in the case at bar, Madera received notice of the seven (7) charges, and these charges were heard by Mr.Justice Wegman, "that which had been heard and determined on such notice" (Standard

Oil Company of Indiana, supra, p. 281 of 224 U.S.) were not the seven (7) charges, but -- as the decision, limited by the opinion, demonstrates -- only five (5) charges.

As this Court said in Fayerweather v. Ritch, 195 U.S. 276, 297

> "In Chicago, Burlington &c. Railroad v. Chicago, 166 U.S. 226, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234):
>
> "'But a State may not by any of its agencies, disregard the prohibitions of the Fourteenth

Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.'"

It is respectfully submitted that the proper course to adopt in this case would be to vacate the judgment of the Court of Appeals of the State of New York, direct said Court to vacate the order of disbarment, and remand the proceeding to the Appellate Division to pass upon and dispose of the still undisposed of two (2) charges referred to above, and in the light of said disposition, enter a new order as justice requires.

In this connection, it should be noted that the disposition of these two charges - must necessarily affect the disposition - or, rather, the redisposition -- of the remaining five (5) charges, for these reasons: First, all the charges turned upon the credibility of witnesses, including Madera; secondly, all the charges are substantially similar in nature; and third, each of the two charges was made by a complainant who made one of the other five charges. More particularly, the undisposed of charge relating to 684 President Street (petition, A-28 to A-29) was a charge made by Mirtes Sobral, who also made two of the other five (5) charges (the charge relating to 511/519 Myrtle Avenue (petition, A-26 to A-27), and the charge relating to 409 Bristol Street (petition, A-27 to A-28). And the undisposed of charge relating to 270 Prospect Park West (petition, A-30

to A-31) was made by Joseph Pedretti, who also made one of the other five (5) charges, namely, the charge relating to 472 Warren Street (petition, A-29 to A-30).

> The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question arising from the conflict between the decision and the order of disbarment, sought to be reviewed, was raised.

The federal question arising from the conflict between the order of disbarment and the decision, was raised by Madera in the state courts, as follows: In the court of first instance -- the Appellate Division -- the question was raised, for the first time in the proceedings -- it could not possibly have been

raised before the Appellate Division's decision, opinion and order of disbarment, which together introduced the conflict into the case for the first time -- on Madera's application to vacate the order of disbarment on the ground of said conflict (A-149 to A-154). The motion was denied (A-167 to A-170).

Madera also raised the question a second time in the Appellate Division, on his motion for leave to appeal to the Court of Appeals from the order of disbarment (A-171 to A-178). More particularly, the motion for such leave was based upon all the grounds advanced on the motion to vacate the order of disbarment (A-177).

Madera further raised the question in the Court of Appeals on his motion for a stay of the order of disbarment pending the determination of his appeal, taken as of right, on federal constitutional questions, from the order of disbarment (A-198 to A-201

and A-202 to A-212).

> The invalidation of all the proceedings taken by the Appellate Division (including the reference ordered by it) resulting from the failure of that court and the Bar Association to accord to Madera, prior to the filing of charges with the said court, and in accordance with long-settled practice, a preliminary investigation of the charges by the Bar Association's Grievance Committee, which includes adversary hearings in the nature of judicial proceedings*

Prior to the filing by the Bar Association with the Appellate Division of the former's petition containing charges against Madera, it had long been, and still is, the settled practice in the Second Department of the State --

*And service of formal written changes.

-which consists of a population of several million, including thousands of attorneys -- and as confirmed by the by-laws of the Bar Association herein (A-3 to A-7), prior to the filing by the Bar Association with the Appellate Division of a petition containing charges against an attorney (except, of course, in the case of attorneys who have been convicted of a felony, where disbarment follows automatically; New York Judiciary Law, sec. 90, subd. 4), to subject the charges, in the first instance, to a preliminary investigation by the Bar Association's Grievance Committee, for the purpose of determining whether sufficient grounds exist for the submission of formal charges.

The nature of the preliminary investigation is prescribed by the Bar Association's by-laws (A-3 to A-7), which require such an investigation before charges are filed with the Appellate Division. These by-laws are, of course,

binding upon the Bar Association. Vitarelli v. Seaton, 359 U.S. 535, 539-540, since the grievance committee is an arm of the Appellate Division* The investigation includes the service upon the attorney of formal written charges and adversary hearings (A-3 to A-7), which are in the nature of judicial proceedings. Weiner v. Weintraub, 22 N.Y. 2d 330, 331; see Matter of Zaslav, 21 A.D. 2d 242, 248.

In its petition, the Bar Association alleged compliance with its by-laws in the foregoing respects (A-23 to A-24). The allegation, however, does not square with the facts, which show that no preliminary investigation, as required by the by-laws -- including service of formal written charges, and adversary hearings -- was ever conducted (A-8 to A-11; A-41 to A-49; A-50 to A-63; A-64 to A-69).

*Weiner v. Weintraub, 22 N.Y.2d 330

While, admittedly, nothing in the Constitution of the United States requires that an attorney, prior to the filing of charges with a court having disciplinary jurisdiction, must be given a preliminary investigation by the Bar Association, nevertheless, once the State, as in the case at bar, has created that right, and the granting thereof has, as in the case at bar, become a settled practice, the failure to grant it -- especially on the request of the attorney, as in the case at bar (A-41 to A-69) -- represents a denial of the equal protection clause of the Fourteenth Amendment. Griffin v. Illinois, 351 U.S. 12, 18; Williams v. Oklahoma City, 359 U.S. 458, 459-460, both to be read with Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 and Baird v. State Bar of Arizona, 402 U.S. 1, 8. The failure would also appear to represent a denial of the due process

vouchsafed by the Fourteenth Amendment. Boddie v. Connecticut, 401 U.S. 371, 374-375, 384.

> The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question arising from the failure to conduct a preliminary investigation, sought to be reviewed, were raised

The federal questions arising from the failure to conduct a preliminary investigation were raised by Madera in the court of first instance -- the Appellate Division -- by an application, made in response to the filing of the Bar Association's petition of charges, to refer the charges back to the Bar Association for said preliminary investigation (A-41 to A-69).

The question was raised again in the Appellate Division on Madera's motion to vacate the order of disbarment (A-158 to A-160).

The question was raised again by Madera in the Appellate Division on his motion for leave to appeal to the Court of Appeals from the order of disbarment, in that the latter motion was based on all the grounds advanced on the motion to vacate the order of disbarment (A-177).

The question was also raised by Madera in the Court of Appeals on his application for a stay of the order of disbarment pending the determination of his appeal from said order, taken to that court, as a matter of right, on federal constitutional questions, among others (A-222 to A-231).

The proceedings in the Appellate Division were void because, prior to the filing of the charges with said Court, the Chairman of the Grievance Committee repeatedly acted as a de facto and ad hoc attorney for one of the complainants in obtaining from Madera payment of numerous successive overdue installments on a settlement sum agreed upon, and then, said Chairman, acting as a quasi-judicial officer -- that is, as a member of the Grievance Committee, which is an arm of the Appellate Division, and thus a quasi-judicial body -- voted to recommend filing of charges with the Appellate Division,and also thereafter testified before Mr. Justice

Wegman

as a witness for the Bar Association, with respect to the foregoing matters

Prior to the filing of charges with the Appellate Division, a conference was held among the Chairman of the Grievance Committee,Edward J. Connolly, and the attorney for a complainant, Mr. Cortese -- whose complaint became a charge in the petition filed with the Appellate Division (A-31 to A-33) -- and Madera, at which a sum in settlement of Mr. Cortese's claims was agreed upon (A-241 to A-24[illegible] .

The sum was to be paid in installments (A-243, A-245).

Each payment except the first fell into arrears (A-246).

Thereafter, Mr. Connolly repeatedly made calls to Mr. Madera, and obtained payment of each successive overdue installment (A-245 to A-250).

Thereafter, Mr. Connolly voted with the Grievance Committee to recommend filing of charges with the Appellate Division (A-8 to A-11, A-12 to A-13, A-50 to A-63), purportedly in accordance with the Bar Association's by-laws (A-3 to A-7).

The Grievance Committee is an arm of the Appellate Division, and thus a quasi-judicial body. Wiener v. Weintraub, 22 N.Y. 2d 330, 331-332.

Thus, in voting, Mr. Connolly acted as a quasi-judicial officer.

Mr. Connolly, however, as shown above, had acted as Mr. Cortese's de facto ad hoc attorney on numerous occasions, collecting overdue installments from Mr. Madera, and certainly forming impressions of Mr. Madera which were not favorable.

Nevertheless, he voted, as a quasi-judicial officer, to recommend filing of charges with the Appellate Division.

In doing so, he violated Mr. Madera's right to an impartial judge, granted by the due process clause of the

Fourteenth Amendment. Johnson v. Mississippi, 403 U.S. 212, 216.

It follows, therefore, that the filing of the charges -- which was required by the by-laws of the Bar Association (A-3 to A-7) and the due process clause to be voted on by impartial quasi-judicial officers -- was improper, and thus the proceedings in the Appellate Division, based thereon were likewise improper.

> The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question arising from the foregoing facts, sought to be reviewed, was raised.

Madera raised the federal question arising from the foregoing facts, in the court of first instance -- the Appellate Division -- on his motion to

vacate the order of disbarment (A-161 to A-166). Raising the question at that time was timely. Cohen and Karger, The Powers of the New York Court of Appeals (Rev. Ed. 1952), sec. 169, p. 64, note 56, and preceding footnote.

The question was raised again by Mr. Madera in the Appellate Division, on his motion for leave to appeal to the Court of Appeals from the order of disbarment, since that motion was made on all the grounds asserted on the motion to vacate the order of disbarment (A-177).

Madera raised the question in the Court of Appeals on his motion for a stay of the order of disbarment pending determination of his appeal from the order of disbarment, taken to that Court, as of right, upon federal constitutional questions, among others (A-231 to A-238).

REASONS FOR GRANTING THE WRIT

From the foregoing, "Statement of the Case", it appears that (a) the judgment of the Court of Appeals of the State of New York sought to be reviewed, dismissing Madera's appeal from the order of disbarment because no substantial constitutional question is directly involved, and (b) the order of disbarment itself, are both not only plainly erroneous, but also in conflict with settled holdings of this court on constitutional questions.

Moreover, it is unarguable that the constitutional errors involved herein are of the kind which occur frequently in disbarment proceedings, and are likely to recur frequently in the future.

The questions,we submit, are of transcendental importance to the bar and bench.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

Alex A. Bohm
101 Park Avenue
New York, New York

Counsel for Petitioner

May 5, 1973

APPENDIX OF STATUTES

Mc Kinney's Consol. Laws of New York, Ann. (Book 29); Judiciary Law Sec. 90.Admission to and removal from practice by appellate division; character committees (p.117).....

.....

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of supreme court is hereby authorized to revoke such admission for any mis-

representation or suppression of any information in connection with the application for admission to practice. (p. 119)

.....

.....

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

.....

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented,that he cannot with due dilignece be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being hear in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the

presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal and upon good cause shown and upon such terms as may be deemed just be such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the

county treasurer of a county within the judicial department, which expenses shall be a charge upon the county.

.....

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therin, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a

bar association or other corporation or association which is the petitioner therein. (p. 121).

APPENDIX OF STATUTES

McKinney's Consol. Laws of New York,

Ann; Penal (Book 39, Secs. 1.00 to 219.)

Sec. 155.5 Larceny; defined

1. A person steals property and committ larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore define or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

.....

(p,414)

.....

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendent's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based

only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed. (p. 415)

.....

Sec. 185.10 Fraudulent disposition of mortgaged property.

A person is guilty of fraudulent disposition of mortgaged property when, having theretofore executed a mortgage of real or personal property or any instrument intended to operate as such, he sells, assigns, exchanges, secretes, injures, destroys or otherwise disposes of any part of the property,

upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee or a purchaser thereof.

Fraudulent disposition of mortgaged property is a class A misdemeanor. L.1965,c.1030,eff. Sept.1,1967 (p.604).....

Sec. 185.05 Fraud involving a security interest

A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property securing a monetary obligation owed to a secured party, and:

1. Having under the security agreement both the right of sale or other disposition of the property and the duty to account to the secured party for

the proceeds of disposition, he sells or otherwise disposes of the property and wrongfully fails to account to the secured party for the proceeds of disposition; or

2. Having under the security agreement no right of sale or other disposition of the property, he knowingly secretes, withholds or disposes of such property in violation of the security agreement.

Fraud involving a security interest is a class A misdemeanor. L.1965,c. 1030, eff.Sept. 1, 1967 (p.603)

Sec. 190.05 Issuing a bad check

A person is guilty of issuing a bad check when:

1. (a) As a drawer or representative drawer, he utters a check knowing that he or his principal, as the case may be

does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time of utterance that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation; or

2. (a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation.

Issuing a bad check is a class B misdemeanor. L.1965,c.1030,eff.Sept.1, 1967. (p. 609)

1496

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Supreme Court, U. S.
FILED
MAY 5 1973
MICHAEL RODAK, JR., CL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1496

FRANK R. MADERA, Petitioner

v.

BROOKLYN BAR ASSOCIATION, Respondent

APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

ALEX A. BOHM
101 Park Avenue
New York, New York 10017

Counsel for petitioner

May 5, 1973

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FILED AND ENTERED DECEMBER 6, 1972

JUDGMENT OF COURT OF APPEALS
OF STATE OF NEW YORK SOUGHT
TO BE REVIEWED

FILED DECEMBER 6, 1972

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of December A.D. 1972.

Present,

Hon. STANLEY H. FULD,
Chief Judge, presiding.

---

2 Mo. No. 603
In the Matter of
Frank R. Madera, an Attorney,
Brooklyn Bar Association,

Respondent,

vs.

Frank R. Madera,

Appellant.

JUDGMENT OF COURT OF APPEALS
OF STATE OF NEW YORK SOUGHT
TO BE REVIEWED

FILED DECEMBER 6, 1972

A motion for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

A copy

Gearon Kimball
Deputy Clerk

BY-LAWS OF BROOKLYN BAR ASSOCIATION REQUIRING SERVICE OF WRITTEN CHARGES UPON ATTORNEY, AND ADVERSARY HEARING IN NATURE OF JUDICIAL PROCEEDING (see WEINER v. WEINTRAUB, 22 N.Y. 2d 330, 331).

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn 1, N.Y.

CERTIFICATE OF INCORPORATION

By-Laws

Officers

Founded 1872

Incorporated Under
Chapter 317 Laws of 1887
of the
State of New York
July 2, 1889

1963

.....

ARTICLE XI

PROCEDURE RESPECTING GRIEVANCES, COMPLAINTS AND INVESTIGATIONS

.....

BY-LAWS OF BROOKLYN BAR ASSOCIATION REQUIRING SERVICE OF WRITTEN CHARGES UPON ATTORNEY, AND ADVERSARY HEARING IN NATURE OF JUDICIAL PROCEEDING (see WEINER v. WEINTRAUB, 22 N.Y. 2d 330, 331)

.....

Sec. 2. Complaints against attorneys and counsellors at law:

a. Every such complaint shall be in writing and signed.

b. If it shall appear from such complaint that there may be probable cause to believe that the attorney complained of (hereinafter called the respondent) has been guilty of professional misconduct, the Committee shall in writing state to the attorney the substance of the complaint, asking him to state in writing his version of the transaction, and upon receipt of his statement shall send a copy thereof to the complainant with a request for any denial or further statement. If upon such complaint, respond-

ent's statement, and the reply, if any, it appears that there may be probable cause to believe that the respondent has been guilty of professional misconduct, the Committee shall cause a notice of hearing of the charges to be served upon the complainant and the respondent in such manner as the Committee may direct, and at the time and place appointed shall proceed to a hearing of the matter. The complainant and respondent may appear personally and by counsel and may call witnesses.

c. The Committee, in each case, exclusive of any member who may have made the complaint, or against whom the complaint is made, shall hear and

determine the case, and shall decide all questions of evidence.

d. Upon the affirmative vote of a majority of the whole Committee, it may recommend prosecution of the respondent to the Board of Trustees.

33

.....

ARTICLE V.

BOARD OF TRUSTEES

.....

14

.....

Sec. 7. The Board shall also receive all reports and recommendations of the Committee on Grievances with reference to any complaint against an attor-

BY-LAWS OF BROOKLYN BAR ASSOCIATION REQUIRING SERVICE OF WRITTEN CHARGES UPON ATTORNEY AND ADVERSARY HEARING IN NATURE OF JUDICIAL PROCEEDING (see WEINER v. WEINTRAUB, 22 N.Y. 2d 330, 331)

ney. It may direct the attorney designated by it and appointed by the Presiding Justice of the Appellate Division, Second Judicial Department, if any, or the attorney designated by the Committee on Grievances, to prosecute the respondent in the courts. The members of the Board shall observe secrecy in respect to all matters referred to them by such Committee except where disciplinary action is determined upon.

.....

15

NOTICE SENT TO FRANK R. MADERA OF DECEMBER 10, 1970 MEETING OF GRIEVANCE COMMITTEE OF BROOKLYN BAR ASSOCIATION THAT CERTAIN COMPLAINTS (OF WHICH NO DETAILS WERE GIVEN, OTHER THAN NAMES OF COMPLAINANTS IN ACCOMPANYING LIST, REPRODUCED NEXT; ALL CONTRARY TO ASSOCIATION'S BY-LAWS; SEE FOREGOING PAGES) WOULD BE "PUT BEFORE THE COMMITTEE" (THE WORDS "PUT BEFORE" REPLACING THE STRICKEN PRINTED WORD "HEARD")

BROOKLYN BAR ASSOCIATION
123 REMSEN STREET
Brooklyn, New York 11201
COMMITTEE ON GRIEVANCES

There will be a meeting of this Committee at the above address on ~~November~~ December 10th, 1970 at 4 P.M., at which time ~~complaints of~~ 15 complaints (see annexed list) against you will be ~~heard~~ put before the Committee.

TO:

Frank R. Madera, Esq.
16 Court St.
Brooklyn, N.Y. 11201

You are requested to appear at that time and bring with you any witnesses whose testimony you desire to offer and any

papers you wish
the committee
to consider.

Edward J. Connolly
Chairman
Committee on
Grievances*

*The Committee did not arrange to call, and did not call, any other witness, including any complainant.

LIST ANNEXED TO FOREGOING NOTICE OF DECEMBER 10, 1970 MEETING, GIVING NAMES OF COMPLAINANTS, BUT NO DETAILS OF COMPLAINTS

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn, N.Y. 11201

MAin 4-0675

Committee on Grievances

#94-70/71-FRANK MADERA, ESQ. (MR. HARVEY O. LAZAROWITZ)

#73-70/71-FRANK MADERA, ESQ. (MR. JACINTO FEBO)

#53-70/71-FRANK MADERA, ESQ. (MRS. MIRTOS SOBRAL)

#76-70/71-FRANK MADERA, ESQ. (MR. FRANK GIANGRASSO)

#30-70/71-FRANK MADERA, ESQ. (MRS. AMELIA VASILE)

#164-69/70-FRANK MADERA, ESQ. (MR. SIDNEY CHERNUCHIN)

#171-69/70-FRANK R. MADERA, ESQ. (MR. JERRY WEXLER)

LIST ANNEXED TO FOREGOING NOTICE OF DECEMBER 10, 1970 MEETING, GIVING NAMES OF COMPLAINANTS, BUT NO DETAILS OF COMPLAINANTS

#31-70/71-FRANK MADERA, ESQ. (MRS. VIRGINIA MALERO)

#171-69/70-FRANK R. MADERA, ESQ. (MR. IRVING BERLIN)

#104-69/70-FRANK R. MADERA, ESQ. (ALBERT B. GINS, ESQ.)

#51-70/71-FRANK MADERA, ESQ. (MR. ANDRE VASQUEZ)

#36-70/71-FRANK MADERA, ESQ. (MR. JOSSEPH PEDRETTI)

#48-70/71-FRANK MADERA, ESQ. (MRS. AFFERMINA MOODY)

#38-70/71-FRANK MADERA, ESQ. (MR. HARRY SMITH)

#72-70/71-FRANK MADERA, ESQ. (MR. ANDRES IRIZARRY)

SUBPOENA ISSUED BY CLERK OF SUPREME COURT OF STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT (COURT HAVING JURISDICTION OVER COMPLAINTS AGAINST ATTORNEYS, OF WHICH GRIEVANCE COMMITTEE OF BROOKLYN BAR ASSOCIATION IS ARM), DIRECTED TO FRANK R. MADERA, REQUIRING HIS APPEARANCE AND TESTIMONY, AND PRODUCTION OF FILES, AT DECEMBER 10, 1970 MEETING OF SAID COMMITTEE

THE PEOPLE OF THE STATE OF NEW YORK

TO

Frank R. Madera, Esq.
16 Court Street
Brooklyn, New York 11201 GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before the Grievance Committee of the Brooklyn Bar Association at 123 Remsen Street, Brooklyn, New York 11201, on the 10th day of December ~~196~~ 1970 at 4 o'clock in the afternoon and at any adjourned date, to testify and give evidence with respect to certain complaints against You ~~an attorney at law~~ made by 15 complainants ~~on the part of~~

SUBPOENA

and that you bring with you and produce at the time and place aforesaid, your files now in your custody and all other evidences and writings which you have in your custody or power, concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of Court.

WITNESS, Honorable Marcus G. Christ Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the 1st day of December, 1970

Herman M. Pogul
Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

RESPONSE OF FRANK R. MADERA TO NOTICE OF MEETING AND SUBPOENA, INVOKING FIFTH AMENDMENT (INADVERTENTLY NOT REFERRED TO IN RESPONSE), AS APPLIED TO STATES THROUGH FOURTEENTH AMENDMENT, AS CONSTRUED IN SPEVACK V. KLEIN, 385 U.S. 511

December 10, 1970

Grievance Committee
Brooklyn Bar Association
123 Remsen Street
Brooklyn, New York 11201

Re: Matter of Frank R. Madera

Gentlemen:

In response to the subpoena previously served upon the undersigned, returnable before your Committee on December 10, 1970, at 4:00 P.M., the writer, in order to obviate the inconvenience attendant upon what may be the unnecessary meeting of the Committee - unnecessary, in view of the matters set forth below - wishes to state as follows:

With respect to any question or questions which might be put to him at the

hearing, concerning any of the complaints referred to in the subpoena, the undersigned respectfully states that he would - and he hereby so stipulates - decline to answer same, on the ground that the answers would or might tend to incriminate him within the intendment of the self-incrimination clause of the Fourteenth Amendment to the Constitution of the United States, as applied in Spevack v. Klein, 385 U.S. 511, as well as the self-incrimination clause of Article 1, section 6, of the Constitution of the State of New York.

With respect to the records - more particularly, the "files" - called for by the subpoena, relating to said

complaints, the undersigned respectfully states that, with the exception of papers relating to the case involving contingent fee compensation,* he would - and he hereby so stipulates - decline to produce said files on the same ground or grounds as those stated in respect to his oral testimony.

The undersigned further stipulates that the foregoing statement of his position may be made part of the

*Matter of Spevack, 16 N.Y. 2nd 1048, 1050. With respect to exception of the matter involving contingent fee compensation, see the wording of the special rule of the Appellate Division, Second Department, concerning the keeping of records of papers in contingent fee matters. (See N.Y.C.R.R.-New York Compilation of Rules and Regulations-see 691.4(f)).

record or transcript of the hearing or proceedings before your Committee, at which the said subpoena is returnable, with the same force and effect as if the writer had personally appeared before your Committee, and had been so questioned, and had so answered.

With respect to the case involving contingent fee compensation, referred to above, the writer will have the papers relating thereto delivered to your Committee at or before the return time of the subpoena, and, if possible, together with this letter.

The undersigned desires to add - parenthetically only, without in the slightest retracting or modifying

his invocation of the self-incrimination privilege - that it would appear that the subpoena may possibly be unconstitutionally vague in that, among other reasons, it calls for the production of the writer's "files" relating to the complaints - without further description- and without indicating the nature of the papers sought, by the use, for example, of such descriptives as, for example, "pleadings", "correspondence", and the like - let alone, specifying or describing the particular papers desired. Cf. the enumeration in Spevack v. Klein, supra, in the subpoena in that case, of specific items, such as the attorney's "daybook, cash receipts book," etc., etc.

RESPONSE OF FRANK R. MADERA TO NOTICE OF MEETING AND SUBPOENA, INVOKING FIFTH AMENDMENT (INADVERTENTLY NOT REFERRED TO IN RESPONSE), AS APPLIED TO STATES THROUGH FOURTEENTH AMENDMENT, AS CONSTRUED IN SPEVACK V. KLEIN, 385 U.S. 511

Respectfully,

Frank R. Madera

FRM/bj

BROOKLYN BAR ASSOCIATION'S NOTICE OF MOTION, FILED WITH APPELLATE DIVISION, FOR ACTION ON PETITION SPECIFYING SEVEN (7) CHARGES AGAINST FRANK R. MADERA

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND DEPARTMENT

In the Matter of the Petition of
Brooklyn Bar Association in
respect of

FRANK R. MADERA

an attorney and counselor at law.

SIR:

PLEASE TAKE NOTICE that upon the petition of Brooklyn Bar Association verified the 25th day of January, 1971 and the affirmation of Frank A. Barrera, duly executed the same day, a motion will be made before this Court at a term thereof to be held at the Courthouse, Monroe Place and Pierrepont Street, Brooklyn, New York, on the 12th day of

BROOKLYN BAR ASSOCIATION'S NOTICE OF MOTION, FILED WITH APPELLATE DIVISION, FOR ACTION ON PETITION SPECIFYING SEVEN (7) CHARGES AGAINST FRANK R. MADERA

April, 1971 at 9:30 A.M. or as soon thereafter as counsel can be heard, for such action in respect of the respondent as is contemplated by law.

Dated: Brooklyn, New York
January 25th, 1971.

MARSHALL G. KAPLAN
Attorney for Petitioner
50 Court Street
Brooklyn, N.Y. 11201
UL 5 - 7728

TO:

Frank R. Madera
16 Court Street
Brooklyn, N.Y. 11201

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND DEPARTMENT

---x

In the Matter of the Petition of Brooklyn Bar Association in respect of

FRANK R. MADERA

an attorney and counselor at law.

---x

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE SECOND JUDICIAL DEPARTMENT:

The petition of the Brooklyn Bar Association respectfully alleges, upon information and belief:

FIRST: The petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose, among others, as stated in its certificate of

incorporation, to elevate the standard of integrity, honor and courtesy in the legal profession.

SECOND: That Frank R. Madera was admitted to practice as an attorney and counselor at law in the Courts of this State by the Appellate Division of the Supreme Court in the Second Judicial Department on April 26, 1939; that at the times hereinafter mentioned he was and still is an attorney and counselor at law and maintains or maintained an office for the practice of law at 16 Court Street, Brooklyn, New York.

THIRD: That complaints having been made to petitioner in respect of Frank R. Madera, the petitioner pursuant to its by-laws, through its Committee on

Grievances, investigated such complaints and held hearings thereon, notice of which was given to the respondent who participated therein to the extent hereinafter described and thereafter the petitioner, through its Board of Trustees at a regular meeting, having considered the report made by its said Committee upon the conclusion of the said hearings, duly authorized the institution of this proceeding.

FOURTH: Petitioner alleges that the respondent, Frank R. Madera, has, on information and belief, been guilty of professional misconduct, fraud, deceit and conduct prejudicial to the administration of justice, resulting in and arising out of the following com-

plaints made to your petitioner:

I

COMPLAINT OF JACINTO FEBOS

A. That from on or about April 1, 1970 to September 1, 1970 complainant paid to respondent $150.00 each month to be used as payments on a mortgage on property owned by complainant and located at 98 Butler Street, Brooklyn, New York.

B. That respondent had no special, agency or escrow bank account.

C. That respondent mingled complainant's funds with his own.

D. That the money paid to respondent by complainant was not used for the purpose of paying the said mortgage and as a result thereof the same was foreclosed.

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

II

COMPLAINTS OF MIRTES SOBRAL
Re: 511/519 Myrtle Avenue

A. Respondent was the sole stockholder of Atlantic Capital Corp. (Atlantic).

B. That on October 10, 1969 Atlantic purchased certain real property variously described as 511 or 519 Myrtle Avenue, Brooklyn, New York from Josephine Scotti.

C. That on or about February 1, 1970 Atlantic, for a consideration, conveyed to the complainant the said premises and took back a purchase money mortgage.

D. That neither the deeds nor the mortgage were ever recorded.

E. That on June 30, 1970 Atlantic conveyed the same property to Rockaway Realty Inc.

F. That as a result of the foregoing complainant has no interest of any kind in the property described.

G. That notwithstanding the foregoing the respondent collected payments on the purported purchase money mortgage from the complainant in May, June and July 1970 in the amount of $200.00 on each occasion.

Re: 409 Bristol Street

H. That respondent represented complainant in connection with a condemnation proceeding involving premises 409 Bristol Street, Brooklyn, New York.

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

I. That respondent collected an award totalling $6,197.56 from which he agreed to satisfy a home improvement loan made to complainant by The Chase Manhattan Bank.

J. That respondent never satisfied the said loan.

K. That on two occasions respondent gave complainant checks, each in the sum of $4000.00 and that on each occasion the check was returned for insufficient funds.

L. That thereafter respondent paid complainant $3000.00 in cash but the balance of the condemnation award he has converted to his own use.

Re: 684 President Street

M. That complaint acquired

premises 684 President Street, Brooklyn, New York on January 5, 1968.

N. That the premises were encumbered by a mortgage on which regular payments were made to respondent.

O. That notwithstanding the foregoing the mortgage was defaulted and subsequently foreclosed upon.

III

COMPLAINTS OF JOSEPH PEDRETTI

Re: 472 Warren Street

A. That complainant purchased a mortgage from respondent on premises 472 Warren Street, Brooklyn, New York for the sum of $8000.00 on or about July 9, 1965.

B. That the mortgage was exe-

cuted by respondent as president of Discount Realty Corp. (Discount).

C. That in truth and fact Discount did not own the premises 472 Warren Street on the date alleged and never had the right to mortgage the same.

D. That respondent thereby converted the said $8000.00 to his own use.

Re: 270 Prospect Park West

E. Respondent sold complainant a mortgage on premises 270 Prospect Park West, Brooklyn, New York.

F. That on May 20, 1969 respondent executed a release which recited that the said mortgage had been assigned to him.

G. That no such assignment has ever been recorded and therefore the said release is of no value.

H. That as a result of the foregoing respondent has converted the consideration received for said mortgage to his own use.

IV

COMPLAINT OF ALBERT B. GINS
on behalf of ANGELO CORTESE

A. That complainant Cortese advanced to respondent the sum of $10,504.25 in July, 1962 for a mortgage on premises 391 Vermont Street, Brooklyn, New York.

B. That in January, 1963 complainant advanced to respondent the sum of $8000.00 for a mortgage on premises 108 Floyd Street, Brooklyn, New York.

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

C. That without complainant's consent, respondent gave him a mortgage on premises 1419 Gates Avenue, Brooklyn, New York in lieu of the Floyd Street property.

D. That respondent made various payments on the said mortgages until April 16, 1968. At the time of the complaint he owed about $9000.00 on the said mortgages.

E. That on at least three different occasions respondent gave complainant checks which were dishonored because of insufficient funds.

F. That respondent represented to complainant that the said mortgages were good investments.

G. That in truth and fact the

houses secured by the mortgages were gutted, vandalized and worthless.

WHEREFORE, petitioner prays for such action in respect to Frank R. Madera as is contemplated by law.

Dated: Brooklyn, New York
January 26th, 1971.

BROOKLYN BAR ASSOCIATION

By:_____
President

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

STATE OF NEW YORK)

COUNTY OF KINGS) SS.:

FRANK A. BARRERA, being duly sworn, deposes and says: That he is the President of Brooklyn Bar Association, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; and the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me
this 25th day of
January, 1971.

Frank A. Barrera

Guy M. Puca
Notary Public, State of New York
No. 30-8452100-Qual.in Nassau Co.
Certificate filed in Kings County
Commission Expires March 30, 1972

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND DEPARTMENT
----------x

In the Matter of the Petition of
Brooklyn Bar Association in
respect of

FRANK B. MADERA

an attorney and counselor at law.

,,,,,----------x

FRANK A. BARRERA, an attorney admitted to practice before the Courts of this State, hereby affirms the truth of the following statements:

That I am the President of Brooklyn Bar Association, the petitioner herein.

That the Board of Trustees of petitioner designated Marshall G. Kaplan, Esq. to prepare and serve and file the petition herein.

PETITION SPECIFYING SEVEN (7) CHARGES, MADE BY FOUR (4) COMPLAINANTS, AND GROUPED INTO FOUR (4) CATEGORIES, BY COMPLAINANT

That pursuant to section 90, paragraph 7 of the Judiciary Law, the power to appoint an attorney or counselor at law to prosecute any disciplinary proceeding is vested in this Court. Petitioner respectfully recommends appointment of Marshall G. Kaplan, Esq., 50 Court Street, Brooklyn, New York to prosecute this proceeding.

Dated: Brooklyn, New York
January 25th, 1971.

Frank A. Barrera

ANSWER OF FRANK R. MADERA TO PETITION SPECIFYING SEVEN (7) CHARGES (IN ADDITION TO COMPANION APPLICATION - SEE FOLLOWING PAGES - TO REFER CHARGES BACK TO BAR ASSOCIATION TO HOLD REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of :
Brooklyn Bar Association in respect :
of :
FRANK R. MADERA :
An attorney and counselor at law. :

VERIFIED ANSWER

Respondent, answering the petition herein by SABBATINO & TODARELLI, his attorneys:

1. (a) Denies such part of paragraph "THIRD" of the petition wherein it is stated that hearings were held by Petitioner pertaining to the complaints set forth in the petition and that Respondent participated therein.

(b) Denies knowledge and information sufficient to form a belief as to the balance of said paragraph "THIRD".

2. (a) Denies "A", "C" and "D" of paragraph "FOURTH" (I) of the petition.

(b) Denies "C", "D", "E", "F" and "G" of paragraph "FOURTH" (II) of the petition.

(c) Denies "I", "J", "K" and "L" of paragraph "FOURTH" (II) of the petition in that money deposited by complainant with Respondent were not designed for the uses set forth in said subsections above set forth.

3. Denies in full the charges

set forth in paragraph "FOURTH" (III) of the petition.

4. Denies "C", "D", "E", "F" and "G" of paragraph "FOURTH" (IV) of the petition.

WHEREFORE, Respondent prays for a dismissal of the petition herein.

Dated: New York, New York
May 6, 1971.

/s/ Frank R. Madera
Respondent.

STATE OF NEW YORK)
: SS
COUNTY OF NEW YORK)

FRANK R. MADERA, being duly sworn, deposes and says that he is the Respondent in the within action; that he has read the foregoing verified answer and knows the

contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

/s/ Frank R. Madera

Sworn to before me this

6th day of May, 1971.

/s/ Thomas J. Todarelli

THOMAS J. TODARELLI
Notary Public, State of New York
No. 31-3994315
Qualified in New York County
Commission Expires March 30, 1971

APPLICATION OF FRANK R. MADERA (ACCOMPANYING ANSWER TO PETITION), REQUESTING THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING ADVERSARY HEARINGS IN NATURE OF JUDICIAL PROCEEDING (WEINER V. WEINTRAUB, 22 N.Y. 2d 330, 331)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of
Brooklyn Bar Association in respect of

FRANK R. MADERA

an attorney and counselor at law.

FRANK R. MADERA, an attorney admitted to practice before the Courts of this State, hereby affirms the truth of the following statements:

This statement is made in opposition to the Motion of the petitioner herein.

It is respectfully submitted that the commencement of this proceeding is premature and bypasses several funda-

mental requirements, which are set forth in the by-laws promulgated by The Brooklyn Bar Association to protect and safeguard the interests of respondent. Pursuant to Article XI-Sec. 2 of the by-laws, it is required that upon any complaint a hearing shall be held, and that the complainant and the respondent may appear personally and by counsel and may call witnesses. Inherent in such requirement is the obligation on the part of the Committee to make available for examination any complainant or witness on behalf of the complainant.

In this respect the language contained in Article XI, Sec. 2, subdivision b., of the very rules of procedure

set forth in the by-laws of the Petitioner is most explicit, to wit:

> "***the Committee shall cause a notice of hearing of the charges to be served upon the complainant and the respondent in such manner as the Committee may direct, and at the time and place appointed shall proceed to a hearing of the matter. The complainant and respondent may appear personally and by counsel and may call witnesses."

At no time was any such hearing held, to the knowledge of respondent, nor does respondent know of any testimony having been given.

It is true that a notice to appear was received and also that a Subpoena was personally served on respondent; respondent advised the Committee, in writing, that he would avail himself

of the protection and the privileges outlined in the Constitution of the United States and in the Constitution of the State of New York. However, such reliance upon Constitutional protection did not excuse the Committee from proceeding with a full hearing and from producing witnesses and making witnesses and complainants available for interrogation and examination.

Although this is not the time or the place to contest the veracity of the allegations contained in the Petition, the objection to the commencement of this proceeding is based on several grounds, to wit: That at the outset it is premature and that respondent very definitely

wishes to avail himself of the opportunity to be confronted by witnesses and complainants and to have such witnesses and complainants examined by counsel; That the Petition is to a large extent entirely incorrect and contains numerous statements that are clear mistakes of fact and which give rise to a feeling or atmosphere of suspicion and a sense of misgiving.

Respondent had no contact with the Committee as a whole at any time. The only contact that respondent had was with individual members of the Committee; one with Mr. Connolly at a conference, the time the Cortese-Gins complaint was adjusted; and subsequent thereto, one or

two conferences with Mr. Miller at his office. At no time did respondent ever meet with any of the complainants or witnesses either before the Committee or before any member of the Committee.

The Motion papers contain the allegation that "the Committee held hearings thereon, notice of which was given to the respondent, who participated therein". Respondent does not know of any such hearings and respondent assures the Court that he most definitely did not participate therein. In essence the gist of most of the complaints is of a commercial nature and not actually in the conduct of respondent's law practice and there have been substantial adjustments made through the offices of the Committee of petitioner.

APPLICATION OF FRANK R. MADERA (ACCOMPANYING ANSWER TO PETITION), REQUESTING THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING ADVERSARY HEARINGS IN NATURE OF JUDICIAL PROCEEDING (WEINER V. WEINTRAUB, 22 N.Y. 2d 330, 331)

Respondent does not wish to lengthen this affirmation with categoric denials of the numerous charges contained in the Motion papers, since respondent feels that this is a matter that can best be determined by open testimony, proof and examination. In no wise can it be maintained that there has been a waiver of the proper procedure to be followed by the Committee to hold hearings and to produce witnesses.

It has always been the intention of respondent to be represented by counsel in any hearings to be held before the Committee and to have counsel examine the witnesses and complainants, in order to ascertain the truth of the status of

the allegations contained in the complaints. An attempt to bypass this step is substantially and seriously prejudicial to the rights of respondent and is in clear violation of the rules as set forth in the by-laws of petitioner. There is no justification to warrant the denial of these rights to respondent.

There is an attempt here to spell out a waiver of hearing and a waiver of the rights and safeguards of respondent, when in fact no such waiver was ever made or intended.

WHEREFORE, respondent respectfully requests that the present Motion be denied; that the matter be referred back to the Committee; that hearings be held

APPLICATION OF FRANK R. MADERA (ACCOMPANYING ANSWER TO PETITION), REQUESTING THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING ADVERSARY HEARINGS IN NATURE OF JUDICIAL PROCEEDING (WEINER V. WEINTRAUB, 22 N.Y. 2d 330, 331)

as per procedure set forth in the by-laws of petitioner and that witnesses, complainants and parties be made available for examination and interrogation, all as set forth in the rules of procedure contained in the by-laws of petitioner.

Dated: Brooklyn, New York
April 15, 1971.

FRANK R. MADERA

(a) ANSWER OF BAR ASSOCIATION TO FRANK R. MADERA'S APPLICATION THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS, AND (b) MINUTES OF MEETING, IN PART

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

In the Matter of the Petition of
BROOKLYN BAR ASSOCIATION in respect of

FRANK R. MADERA

an attorney and counselor at law.

----------x

State of New York, County of Kings:

MARSHALL G. KAPLAN, an attorney admitted to practice in all Courts of New York State, under the penalties of perjury, states:

I am the attorney for the petitioner herein. This affirmation is submitted in reply to the affirmation of the respondent dated April 15, 1971. In such affirmation respondent complains that he

had no opportunity to be heard by the petitioner's Committee on Grievances. His contention is incredible.

Annexed hereto are copies of pages 8 through 13 of the stenographic transcript of the minutes of the meeting of the petitioner's Committee held on December 10, 1970. It clearly appears that respondent was served with a subpoena and that he delivered a letter to the Committee in response thereto, in which he asserted his privilege against self-incrimination and stipulated that he would decline to answer questions asked of him. He also declined to produce his files.

The minutes also indicate that respondent had met with a sub-committee

and that his lawyer had also met with the sub-committee. He was the subject of approximately 16 or 17 complaints filed against him and efforts had been made by the petitioner to resolve these matters. Finally, as indicated, respondent refused to cooperate and petitioner's Committee proceeded with its meeting. Under all of the circumstances, it is difficult to see what respondent is complaining about. He never met with the full Committee because he did not choose to do so and not because the Committee failed to afford him a hearing.

It is respectfully submitted that all of respondent's rights were scrupulously afforded to him and that his

present predicament was precipitated by the fact that he declined to cooperate any further with petitioner's committee.

WHEREFORE, it is respectfully prayed that this Court take such action with respect to the respondent as law and justice may require.

Dated: Brooklyn, New York
April 21st, 1971.

Marshall G. Kaplan

(a) ANSWER OF BAR ASSOCIATION TO FRANK R. MADERA'S APPLICATION THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS, AND (b) MINUTES OF MEETING, IN PART

COMMITTEE ON GRIEVANCES
BROOKLYN BAR ASSOCIATION

- -x

In the Matter :

of :

FRANK R. MADERA, :

Respondent :

- -x

123 Remsen Street
Brooklyn, New York
December 10, 1970
4:20 o'clock p.m.

Before

Messrs. Connolly, Chairman
Doyle,
Halpern,
Kirsch,
Lombardo and
Miller,

Committee on Grievances

Appearances:

Michael Caputo, Esq.
Counsel to the Committee on Grievances
Brooklyn Bar Association

(a) ANSWER OF BAR ASSOCIATION TO FRANK R. MADERA'S APPLICATION THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS, AND (b) MINUTES OF MEETING, IN PART

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THE CHAIRMAN: Gentlemen, as you know, this meeting was called for 4:00 o'clock, a special meeting, to hear a matter of approximately sixteen or seventeen complaints filed with us in recent months in regard to Frank R. Madera.

This matter was on our calendar at our meeting of November 19th. Mr. Madera, as shown by the minutes of our last meeting, delivered to us a letter in which he told us that he wished time to obtain new counsel as his prior counsel with whom Mr. Miller, one of our Committee members, had been dealing with for over a

month, had resigned.

All of these matters before the Committee have been referred to Mr. Miller, and Mr. Miller has had some conferences with both Mr. Todarelli and Mr. Madera prior to this meeting, and about which he will make a record in a few minutes.

At our last meeting, we decided that we would ask the Appellate Division to issue a subpoena to Mr. Madera to appear here at this time and to bring with him certain records enumerated fully in the subpoena. The subpoena was served personally on Mr. Madera on what date, Mr. Caputo?

MR. CAPUTO: December 2nd, 1970.

(a) ANSWER OF BAR ASSOCIATION TO FRANK R. MADERA'S APPLICATION THAT CHARGES BE REFERRED BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS, AND (b) MINUTES OF MEETING, IN PART

THE CHAIRMAN: And the affidavit of service has been filled out. I ask that the subpoena be marked as Exhibit 3.

(Subpoena received in evidence and marked Committee's Exhibit 3.)

THE CHAIRMAN: Mr. Madera has not appeared today, and instead has sent to us a letter which was hand delivered to this Association today at 9:45 a.m. I ask that this letter be marked Exhibit 4.

(Letter dated December 10, 1970 from the Respondent to the Grievance Committee received in evidence and marked Committee's Exhibit 4.)

THE CHAIRMAN: This letter is

dated December 10, 1970, Exhibit 4, addressed to the Grievance Committee, Brooklyn Bar Association, 123 Remsen Street, Brooklyn, New York, re: Matter of Frank R. Madera.

"Gentlemen:

"In response to the subpoena previously served upon the undersigned, returnable before your Committee on December 10, 1970, at 4:00 P.M., the writer, in order to obviate the inconvenience attendant upon what may be the unnecessary meeting of the Committee - unnecessary, in view of the matters set forth below - wishes to state as follows:

"With respect to any question or questions which might be put to him

at the hearing, concerning any of the complaints referred to in the subpoena, the undersigned respectfully states that he would - and he hereby so stipulates - decline to answer same, on the ground that the answers would or might tend to incriminate him within the intendment of the self-incrimination clause of the Fourteenth Amendment to the Constitution of the United States, as applied in Spevack v. Klein, 385 U.S. 511, as well as the self-incrimination clause of Article 1, section 6, of the Constitution of the State of New York.

"With respect to the records - more particularly, the 'files' - called for by the subpoena, relating to said com-

plaints, the undersigned respectfully states that, with the exception of papers relating to the case involving contingent fee compensation, he would - and he hereby so stipulates - decline to produce said files on the same ground or grounds as those stated in respect to his oral testimony.

"The undersigned further stipulates that the foregoing statement of his position may be made part of the record or transcript of the hearing or proceedings before your Committee, at which the said subpoena is returnable, with the same force and effect as if the writer had personally appeared before your Committee, and had been so questioned, and

had so answered.

"With respect to the case involving contingent fee compensation, referred to above, the writer will have the papers relating thereto delivered to your Committee at or before the return time of the subpoena, and, if possible, together with this letter.

"The undersigned desires to add - parenthetically only, without in the slightest retracting or modifying his invocation of the self-incrimination privilege - that it would appear that the subpoena may possibly be unconstitutionally vague -- with the exception of the matter involving contingent fee compensation (see the word-

ing of the special rule of the Appellate Division, Second Department, concerning the keeping of records or papers in contingent fee matters) -- in that, among other reasons, it calls for the production of the writer's 'files' relating to the complaints - without further description - and without indicating the nature of the papers sought, by the use, for example, of such descriptives as, for example, 'pleadings,' 'correspondence,' and the like - let alone, specifying or describing the particular papers desired. Cf. the enumeration in Spevack v. Klein, supra, in the subpoena in that case, of specific items, such as the attorney's 'daybook, cash receipts book,' etc., etc.

"Respectfully, Frank R. Madera," Signed, "Frank R. Madera."

Gentlemen, I would recommend, in view of the fact that Mr. Madera is not here and, as stated, that he will not appear and will not testify, that we proceed.

FRANK R. MADERA'S REPLY TO ANSWER OF BAR ASSOCIATION OPPOSING FORMER'S APPLICATION TO REFER CHARGES BACK TO BAR ASSOCIATION FOR REQUIRED PRELIMINARY INVESTIGATION, INCLUDING HEARINGS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of
BROOKLYN BAR ASSOCIATION in respect of

FRANK R. MADERA

an attorney and counselor at law.

STATE OF NEW YORK, COUNTY OF KINGS:

FRANK R. MADERA, an attorney admitted to practice in all Courts of New York State, under the penalties of perjury, states:

I am the respondent herein. This affirmation is submitted in answer to the affirmation heretofore filed by MARSHALL G. KAPLAN, Esq., on the 21st day of April, 1971, in this matter.

The affirmation so submitted,

completely and totally avoids the issue presented in the answer heretofore filed by your respondent. At no time did respondent ever allege that he was not offered an interview or an appointment with the Committee or members of the Committee. The contention of respondent was quite clear, very simply and exactly to the point, to wit: that at no time were any hearings scheduled or witnesses present, or any testimony taken, or any complainants made available for interrogation, inquiry and cross-examination.

At no time during the consideration of the complaints, as far as respondent knows, were any witnesses ever served with a subpoena or requested to

appear before the Committee to give testimony and be made available for interrogation, inquiry and cross-examination. This essentially is the sum and substance of respondent's answer to the original petition.

The reply served by the attorney for the petitioner merely confirms what has been alleged by respondent at all times, to wit: that the Committee and individual members of the Committee offered to interview and question respondent, but nowhere is there any claim made that any hearing was scheduled when any of the complainants or witnesses would be called or their testimony given. In light of the requirement contained within the by-laws of petitioner that

"hearings be held", the requirement is that complainants and witnesses be produced and be made available for interrogation, inquiry and cross-examination.

The copy of the minutes annexed create absolutely nothing to controvert the allegation that no full hearings were ever held and no testimony was ever taken before said Committee and that there was no waiver of the foregoing. Respondent has informed the Court that he was personally served with a subpoena and had received notice to appear before the Committee. However, the act of the respondent in availing himself of his Constitutional rights insofar as his own statement or testimony at the outset is con-

cerned, does not excuse the Committee from proceeding with a full hearing and offering testimony of the witnesses and complainants. This has been clearly set forth in the matter of Spevack vs. Klein, 385 U.S. 511, and nowhere can it be held that the failure of respondent to testify initially can it operate as a waiver of the requirement for hearings, nor may the respondent's failure to testify be used to respondent's detriment.

Even the minutes annexed to petitioner's affirmation show that this is a one-sided discussion by the Committee and its members. Statements were made only by the Committee and its members that there was no testimony taken

and most certainly it does not appear that there was any hearing held or any testimony given by witnesses or complainants.

WHEREFORE, respondent respectfully requests that the motion of petitioner be denied; that this matter be sent back to Committee for full hearings; and for such other and further relief as may be just and proper in the premises.

Dated: Brooklyn, New York
April 22, 1971.

Frank R. Madera

(a) DECISION OF APPELLATE DIVISION DENYING FRANK R. MADERA'S APPLICATION TO REFER CHARGES BACK TO BAR ASSOCIATION, AND (b) EXTENDING MADERA'S TIME TO ANSWER PETITION

(NOT TO BE PUBLISHED)

No. 1340-A In the Matter of Frank R. Madera, an attorney and counselor-at-law.

Brooklyn Bar Association, petitioner; Frank R. Madera, respondent.

Cross application by respondent to deny the petition and remand the matter to petitioner's Committee on Grievances for further hearing denied and respondent's time to answer the petition is enlarged to May 10, 1971.

RABIN, P.J., HOPKINS, MUNDER, MARTUSCELLO and LATHAM, JJ., concur.

April 28, 1971 IN RE FRANK R. MADERA, an attorney

No. 1340-A

ORDER OF APPELLATE DIVISION FORMALIZING DECISION REPRODUCED ON IMMEDIATELY FOREGOING PAGE OR PAGES

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 28, 1971

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. FRED J. MUNDER)
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM) Associate
~~HON. J. IRWIN SHAPIRO~~) Justices
~~HON. FRANK A. CULOTTA~~)
~~HON. MARCUS C. CHRIST~~)
~~HON. ARTHUR D. BRENNAN~~)
~~HON. A. DAVID BENJAMIN~~)

In the Matter of :
Frank R. Madera, an attorney and counselor at law. :

Brooklyn Bar Association, :

Petitioner; :

Frank R. Madera, :

Respondent. :

A disciplinary proceeding having

been instituted in this court upon the petition of the Brooklyn Bar Association in respect to Frank R. Madera, an attorney and counselor at law who was admitted to practice by this court on April 26, 1939; the petition praying that the respondent Frank R. Madera be disciplined for professional misconduct upon the charges therein set forth; the said proceeding having come on to be heard by a notice of motion, dated January 25, 1971, and respondent having made an application to deny the petition and to remand the proceeding to petitioner's Committee on Grievances for further hearing;

NOW, on reading and filing the said petition verified January 25, 1971; the affidavits of Frank R. Madera in support of his application; the affidavit of

ORDER OF APPELLATE DIVISION FORMALIZING DECISION REPRODUCED ON IMMEDIATELY FOREGOING PAGE OR PAGES

Marshall G. Kaplan in opposition thereto; and due deliberation having been had thereon; and Frank R. Madera, respondent appearing pro se; and Marshall G. Kaplan, Esq., having appeared of counsel for petitioner; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is:

ORDERED that respondent's application is hereby denied; and it is further

ORDERED that respondent shall serve and file his answer to the petition on or before May 10, 1971.

Enter:

/s/ Herman M. Pogul

Clerk of the Appellate Division

(a) DECISION OF APPELLATE DIVISION REFERRING ISSUES TO SUPREME COURT JUSTICE, AS REFEREE, TO HEAR AND REPORT, WITH HIS FINDINGS, ON THE ISSUES, AND (b) DESIGNATING ATTORNEY TO PROSECUTE CHARGES

NOT TO BE PUBLISHED

No. 1340. In the Matter of Frank R. Madera, an attorney.

Brooklyn Bar Association, petitioner, Frank R. Madera, respondent.

In a proceeding to discipline respondent, an attorney, for professional misconduct, the issues raised by the petition and the answer are referred to Hon. J. Bertram Wegman, a Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues.

Pursuant to statute (Judiciary Law, Sec. 90, subd. 7), Marshall G. Kaplan, Esq., of 50 Court Street, Brooklyn, New York, an attorney and counselor at law, is designated to prosecute this proceeding on behalf of petitioner.

(a) DECISION OF APPELLATE DIVISION REFERRING ISSUES TO SUPREME COURT JUSTICE, AS REFEREE, TO HEAR AND REPORT, WITH HIS FINDINGS, ON THE ISSUES, AND (b) DESIGNATING ATTORNEY TO PROSECUTE CHARGES

RABIN, P.J., HOPKINS, MUNDER, MARTUSCELLO and LATHAM, JJ., Concur.

May 18, 1971 IN RE MADERA, an Atty.

No. 1340

ORDER FORMALIZING DECISION REPRODUCED ON IMMEDIATELY FOREGOING PAGE OR PAGES

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 18, 1971

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. FRED J. MUNDER)
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM) Associate
~~HON. J. IRWIN SHAPIRO~~) Justices
~~HON. FRANK A. CULOTTA~~)
~~HON. MARCUS C. CHRIST~~)
~~HON. ARTHUR D. BRENNAN~~)
~~HON. A. DAVID BENJAMIN~~)

In the Matter of
Frank R. Madera,
an attorney.

:: Order of Reference, etc.

Brooklyn Bar Association,

Petitioner;

:

Frank R. Madera,

Respondent.

A disciplinary proceeding having been instituted in this court upon the

ORDER FORMALIZING DECISION REPRODUCED
ON IMMEDIATELY FOREGOING PAGE OR PAGES

petition of the Brooklyn Bar Association in respect to Frank R. Madera, an attorney and counselor at law who was admitted to practice by this court on April 26, 1939; the petition praying that the respondent Frank R. Madera be disciplined for professional misconduct upon the charges therein set forth; the said proceeding having come on to be heard by a notice of motion, dated January 25, 1971; thereafter this court by order dated April 28, 1971, having denied respondent's application to deny the petition and to remand the proceeding to petitioner's Committee on Grievances for further hearings and having also directed that respondent shall serve and file his answer to the petition on or before May 10, 1971; and respondent hav-

ORDER FORMALIZING DECISION REPRODUCED ON IMMEDIATELY FOREGOING PAGE OR PAGES

ing filed his answer;

NOW, on reading and filing the notice of motion dated January 25, 1971; the petition verified January 25, 1971; the answer verified May 6, 1971; and upon all the papers filed herein; and due deliberation having been had thereon; and Marshall G. Kaplan, Esq., having appeared for petitioner; and Sabbatino & Todarelli, Esqs., having appeared for respondent; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is:

ORDERED that the issues raised by the petition and the answer are hereby referred to the Hon. J. Bertram Wegman, a Justice of the Supreme Court, Kings County, to hear and to report, with his findings upon each of the issues; and it

ORDER FORMALIZING DECISION REPRODUCED
ON IMMEDIATELY FOREGOING PAGE OR PAGES

is further

ORDERED, pursuant to statute (Judiciary Law, Sec. 90), that Marshall G. Kaplan, Esq., of 50 Court Street, Brooklyn, New York, an attorney and counselor at law, is hereby designated to prosecute the proceeding on behalf of petitioner.

Enter:

/s/ Herman M. Pogul

Clerk of the
Appellate Division

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK : SECOND JUDICIAL DEPARTMENT

----------x

In the Matter of

FRANK R. MADERA, an attorney:

BROOKLYN BAR ASSOCIATION,

Petitioner;

FRANK R. MADERA,

Respondent.

----------x

TO THE HONORABLE, THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND JUDICIAL DEPARTMENT:

Having heard the proofs of the parties upon the issues referred to me by your order entered May 10, 1971, I submit the following report, with my findings, thereon.

Marshall G. Kaplan, Esq., designated by you to prosecute the proceedings

on behalf of the petitioner, appeared in that capacity before me.

At a preliminary meeting before me on May 21, 1971 Thomas J. Todarelli, Esq., whose firm Sabbatino & Todarelli, Esqs., had presented to you respondent's answer to the petition herein and had appeared for respondent in the proceedings prior to your aforementioned order of reference entered May 10, 1971, appeared for respondent, but thereafter, prior to June 8, 1971 the date set for the commencement of the hearing, he withdrew as respondent's attorney. At the hearings held on June 8, 9, 10 and 17, 1971 Joseph Slavin, Esq. appeared and has continued as attorney for the respondent.

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

Transmitted herewith are the typewritten transcripts of the stenographic notes taken of the testimony by the several court reporters variously attending at the hearings, together with all of the exhibits introduced in evidence and for identification by the respective parties.

Respondent was admitted to practice as an attorney and counsellor-at-law by your court on April 26, 1939, and at all of the times involved he maintained an office for the practice of law at 16 Court Street, Brooklyn.

I: I find that the proof sustains the charges in respect of the complaint of Jacinto Febos:

(a) Early in April 1969 Mr.

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

Febos consulted respondent concerning a foreclosure action which had been instituted against property in his wife's name located at 98 Butler Street, Brooklyn. In August 1956 Discount Realty Corp., which was owned and controlled by respondent, had acquired title to the property subject to a mortgage held by the Washington Heights Federal Savings & Loan Association. In October of that year Discount Realty Corp. conveyed the property to Mr. Febos, subject to the mortgage held by Washington Heights Federal Savings & Loan Association and to a purchase money second mortgage in the sum of $7,000 payable with interest at 6% in installments of $65 a month commencing November 3, 1956 until the balance became due on October 3, 1961. This latter mortgage was

assigned in February 1959 to Caryl Kahn, at which time it was said that the balance due was $6,465.39 with 6% interest. In September 1958 Mr. Febos had transferred the title to the property to his wife.

(b) On April 2, 1969 Mamiani Elie, Esq., who was Mr. Febos' attorney, wrote respondent saying that he had been informed by Mr. Febos that respondent would take care of the matter of settling the foreclosure action, enclosing a copy of the summons and complaint therein. He added, "I understand that you held that mortgage at one time and that there is a possibility that this mortgage has been paid in full". Mr. Febos told respondent that he thought he had paid up the mortgage but could not

find any receipts; respondent told Mr. Febos that without receipts he could not prove that the mortgage was paid up and therefore would have to pay the amount that the mortgagee claimed. The complaint alleged that $3257.14 with interest at 6% from July 3, 1968 was due.

(c) On April 14, 1969 Mr. Febos paid respondent the sum of $1200, for which he received respondent's receipt stating that the $1200 was "to be used toward settlement of foreclosure". On May 1, 1969 Mr. Febos paid respondent the sum of $150 for which respondent issued his receipt stating that that sum was "to be sent to mortgagee". On May 29, 1969 Mr. Febos paid respondent the sum of $152.19; on each of the dates July 3, 1969, August 2, 1969, September 3,

1969, October 2, 1969, November 5, 1969, December 5, 1969, January 7, 1970, February 3, 1970, March 5, 1970, April 5, 1970, April 8, 1970, July 8, 1970, July 11, 1970 and September 5, 1970. Mr. Febos paid respondent the sum of $150 and on each occasion he was given respondent's receipt for that sum which recited that the payment was "for 98 Butler Street".

(d) Respondent obtained an extension agreement disposing of the foreclosure action (although in fact that action was not discontinued and the lis pendens cancelled until May 22, 1970), which recited that as of April 3, 1969 the sum of $2,737.14 was due on the mortgage, which Mrs. Febos agreed to pay in installments of $150 on May 3, 1969 and on the third day of each month thereafter

until the principal sum of $2,737.14 with interest at the rate of 7-1/2% per annum from April 3, 1969 was paid in full. Mrs. Febos signed and acknowledged the extension agreement on April 29, 1969; Caryl Kahn, the mortgagee, signed and acknowledged the extension agreement on May 22, 1969.

(e) After paying over to the mortgagee the first seven installments of $150 respondent ceased transmitting the payments. He admits that he did not have or maintain any special or escrow bank account and that he deposited the balance paid to him by Mr. Febos in his personal account and used that money for his own purposes; the balances in his bank account were not sufficient to cover the amounts he had received from Mr. Febos.

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

(f) I find to be untrue and false his claim in his letter dated September 30, 1970 to petitioner in answer to Mr. Febos' complaint, which had been communicated to him by petitioner's Grievance Committee, and his testimony before me to the same effect, that he withheld the payments to the mortgagee to give Mr. Febos an opportunity to find his receipts for prior payments made to Caryl Kahn. I find that Mr. Febos never asked respondent to withhold payments, but on the contrary believed that the payments were being transmitted to Caryl Kahn by respondent. I find to be false and untrue the statement made by respondent in his September 30, 1970 letter to petitioner that respondent advised Mr. Febos that he was risking another foreclosure if he

persisted in not having the payments remitted. I find false and untrue respondent's statement in that letter to petitioner that he merely followed Mr. Febos' instructions to hold on to the money, based on his desire to have the money available in the event that it became necessary that payment or settlement be made in one lump payment and that Mr. Febos always knew that in accordance with his instructions to respondent payment was not being made. In his testimony before me respondent claimed that Mr. Febos wanted him to hold on to the money to be used for the purchase of another house by Mr. Febos. I find that testimony to be false and untrue; on the contrary, I believe the testimony of Mr. Febos that he

never discussed with respondent the purchase of another house.

(g) I find that in a second action instituted on June 30, 1970, judgment of foreclosure and sale was entered on August 13, 1970 and that thereunder on September 16, 1970 the referee sold the property to Caryl Kahn for the sum of $1,000, his deed to her being recorded that same day. On September 26, 1970 respondent obtained a deed conveying the property from Caryl Kahn to Mrs. Febos. Respondent claimed that he paid $3,000 for that deed. That may or may not be so (no evidence was offered in corroboration). He also claimed in his testimony, uncorroborated, that he had turned over Mr. Febos' first payment of $1,200 in settlement of

the prior foreclosure action in order to obtain the extension agreement. But the extension agreement recites that there was due on the mortgage the sum of $2,737.14 on April 13, 1969, 11 days before Mr. Febos gave him the $1,200; the complaint had alleged $3,257.14 due; the total amount turned over to respondent by Mr. Febos was $3,602.19. If respondent paid out more than that amount in "making good" for his misuse and conversion of the funds delivered to him by Mr. Febos, he scarcely is entitled to commendation therefor. However, while it does not obliterate his failure to maintain a special account nor his personal use of trust funds, it is true that he did ultimately "make good" his obligation to Mrs. Febos and that

Mrs. Febos did receive a deed shortly after September 26, 1970, free and clear of the second mortgage.

II: I find the proof in support of the other charges less adequate.

1. Regarding the complaints of Mirtes Sobral:

(a) The petition refers to one of these complaints as relating to 511/519 Myrtle Avenue. In fact, 511 Myrtle Avenue is a parcel of property 20 feet by 100 feet in size located 50 feet westerly of the intersection of the northerly side of Myrtle Avenue with the westerly side of Grand Avenue; it has nothing whatsoever to do with the complaint of Mrs. Sobral. The property with which Mrs. Sobral was concerned was a par-

cel located on the northeast corner of Myrtle Avenue and Grand Avenue, extending 25 feet easterly along the northerly side of Myrtle Avenue from Grand Avenue and 100 feet northerly along the easterly side of Grand Avenue from Myrtle Avenue. This property was known as 519 Myrtle Avenue and also as 109 Grand Avenue.

(b) Sometime prior to February 1, 1970 Mrs. Sobral took over the handling of this property. She collected the rents, variously stated as from $400 to $600 a month, paid for the oil and electricity, took care of the property and paid to the respondent the sum of $200 a month. In December 1969 she entered into a contract with Atlantic Capital Corp., which respondent controlled as

its sole stockholder, to which title to the property had been conveyed in October 1969 whereby, among other provisions, it was agreed that Mrs. Sobral would purchase the property for $34,000, $32,000 of which was to be by a purchase money mortgage. By a subsequent modification it was agreed that the price would be reduced to $31,000 and the purchase money mortgage to $29,000. On February 1, 1970 a deed was made and executed by Atlantic Capital Corp. to Mrs. Sobral and she made, executed and delivered to Atlantic Capital Corp. a purchase money bond and mortgage in the sum of $29,000. Neither the deed nor the mortgage was recorded. On January 31, 1970 respondent gave Mrs. Sobral a notice dated that date addressed to the tenants

of the property introducing Mrs. Sobral and authorizing her to collect all rents from February 1, 1970 forward. On April 9, 1970 respondent prepared for Mrs. Sobral, and she signed as landlord, a notice addressed to the tenant of the store at 519 Myrtle Avenue terminating his monthly tenancy on May 14, 1970 and notifying him that if he remained in occupancy his rent would be increased to $150 a month commencing May 15, 1970.

(c) Sometime in March 1970 respondent entered into negotiations with Samuel Beinhart, Esq. which culminated in an agreement that Mr. Beinhart would loan respondent the sum of $25,000, secured by the $29,000 mortgage on the property at 519 Myrtle Avenue, a $14,000 purchase

money mortgage dated March 30, 1970 on the property at 511 Myrtle Avenue signed by one Ramon Rodrigues to whom respondent's corporation, Atlantic Capital Corp. had conveyed the property by deed dated March 30, 1970 and a $7500 mortgage on premises 148 Fifth Avenue, Brooklyn. On April 9, 1970 Mr. Beinhart advanced $7500 to respondent who had signed a note on behalf of Atlantic Capital Corp. to Mr. Beinhart's order in the sum of $25,000 payable $2000 per month with interest at 10% per annum, which Mr. Beinhart endorsed to the order of his corporation, Fulbany Realty, Inc.

(d) Respondent delivered to Mr. Beinhart, who undertook to have them recorded, the deeds to Mrs. Sobral and to Rodriguez and the respective mortgages, and

signed an affidavit of title concerning the bond and mortgage in the sum of $29,000 from Mrs. Sobral to Atlantic Capital Corp. and a similar affidavit of title concerning the bond and mortgage in the sum of $14,000 from Mr. Rodriguez to Atlantic Capital Corp. Respondent also executed and Mr. Beinhart signed as secretary of Fulbany Realty Inc. an option granted by Fulbany Realty Inc. to Atlantic Capital Corp. to purchase the three mortgages, that is to say, the $7500 mortgage on premises 148 Fifth Avenue, the $14,000 mortgage on 511 Myrtle Avenue and the $29,000 mortgage on 519 Myrtle Avenue, for the price of $29,500, payable $2,000 a month commencing May 9, 1970.

(e) On the following Saturday (April 11, 1970) respondent went to his office at Mr. Beinhart's request and at 11:30 A.M. Mr. Beinhart came to respondent's office with a number of blank deeds, assignments of mortgage, confessions of judgment and affidavits of title. He insisted that he needed these papers in his files saying, "if anything ever happens to you you got my money". Mr. Beinhart took the Atlantic Capital Corp. seal which was on respondent's desk and put it on some of the papers although respondent did not know which. All of the papers were blank; nothing was typed on them. No notary was present. Respondent signed blank forms, believing that Mr. Beinhart was goind to hold them.

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

(f) On April 16, Mr. Beinhart advanced an additional $10,000 to respondent. Thereafter disputes arose and there were mutual recriminations and accusations. By false representations during respondent's absence from his office, Mr. Beinhart induced and prevailed upon respondent's secretary who was a notary public, to sign her name as such on blank instruments respondent had signed on April 11th. Later these blank forms were completed by Mr. Beinhart in his own office, without foreknowledge of respondent, among which were (1) a deed dated May 4, 1970, recorded June 30, 1970, whereby it appeared that Atlantic Capital Corp. had conveyed to Rockaway Realty, Inc. (Mr. Beinhart's creation) the two parcels of

property at 511 Myrtle Avenue and at 519 Myrtle Avenue, which parcels, of course, Mr. Beinhart knew had previously been conveyed as noted above; and (2) an affidavit of confession of judgment purporting to have been signed and sworn to by respondent on May 4, 1970, confessing judgment in favor of Fulbany Realty, Inc. in the sum of $25,000 - on which judgment was entered in Nassau County on May 20, 1970.

(g) What purports to be a letter dated June 30, 1970 addressed to the tenants of 519 Myrtle Avenue on respondent's letterhead and signed by respondent, notifying the tenants that the property had been conveyed to Rockaway Realty, Inc. and that thereafter rents were to be paid to Mr. Beinhart is de-

nounced by respondent as a forgery. I believe him.

(h) On the critical element of the charge on this complaint, (1) that respondent after conveying the property to Mrs. Sobral conveyed the same property to Rockaway Realty, Inc.; and (2) that as a result Mrs. Sobral has no interest in the property, I find the same not sustained for the reason that the conveyance to Rockaway Realty is fraudulent and after full notice that the putative grantor had no title to convey, having theretofore conveyed to Mrs. Sobral. This is not to say that I find the respondent blameless for the complications, but I cannot find support for the charge made.

(i) The complaint of Mrs.

Sobral concerning 409 Bristol Street relates to the alleged conversion by respondent of the proceeds of a condemnation award. The only testimony proffered was that of respondent, which was completely exculpatory. I find no reason to disbelieve him, particularly since Mrs. Sobral refused to appear and testify in support of any of her complaints, either before petitioner's Grievance Committee or before me. Under the circumstances I must find for the respondent on this charge.

(j) The final complaint of Mrs. Sobral relates to 684 President Street. Here I find a peculiar situation: doubtless through inadvertence there is no reference in the answer to the paragraphs

of the petition specifying the charge, hence obviously no denial thereof. Nevertheless respondent called as a witness by petitioner was asked about the facts involved, and his answers demonstrated that there was no basis for any charge in that regard. No other proof whatsoever was adduced. Accordingly, despite the omission of a denial in the answer, I am impelled in the interest of plain justice to find that this charge has not been at all sustained and appears to be baseless.

2: Regarding the complaints of Joseph Pedretti:

(a) It appears that Mr. Pedretti's relationship with respondent was not that of client and lawyer but rather that of money-lender and borrower who paid some 14% per annum for the use of

converted complainant's funds to his own use.

(c) The second Pedretti complaint relates to premises 270 Prospect Park West. The charge is that some four years after respondent sold complainant a subordinate mortgage on the premises in 1965, respondent as assignee thereof purported to execute and deliver to complainant a release of a prior mortgage on these premises, that prior mortgage having covered these premises and two other parcels, whereas the assignment to respondent had not been recorded and was therefore of no value. But the mortgage had been assigned to respondent and was effective although not recorded. I find that petitioner has failed to prove the charge that "as a result of

the foregoing respondent has converted the consideration received for said mortgage to his own use."

(d) I find that on January 5, 1971 an account was stated between this complainant and respondent covering some eleven or twelve mortgage transactions and respondent then guaranteed payment of the obligations which theretofore had been corporate obligations. Strangely, perhaps, the instrument recites that these obligations total some $82,645., although the itemized list thereof actually totals a good deal less than that sum! Presumably, complainant is now well satisfied; he did not appear and testify.

3. Regarding the complaint of Angelo Contese:

REPORT OF REFEREE, FINDING ONLY ONE OF THE SEVEN (7) CHARGES TO HAVE BEEN SUSTAINED, AND THE REMAINING SIX NOT TO HAVE BEEN PROVED

(a) The substance of this complaint is that complainant had advanced the sum of $8,000 to respondent for a mortgage on premises 108 Floyd Street, Brooklyn and that without complainant's consent respondent had given him a mortgage on premises 1419 Gates Avenue, Brooklyn, instead.

(b) The proof established beyond doubt that complainant knew and acquiesced in the placement of the mortgage on premises 1419 Gates Avenue instead of premises 108 Floyd Street.

(c) The petition charges that "the houses secured by the mortgages" (referring to premises 391 Vermont Street, Brooklyn, and 1419 Gates Avenue) "were gutted, vandalized and worthless." I

find that that occurred long after these mortgages were placed and without any fault or omission on respondent's part.

(d) I find that respondent made payments to complainant out of his own funds after defaults on these mortgages and that on at least three occasions, as the petition alleges, respondent's checks were dishonored for insufficient funds on deposit in his bank account.

(e) I find that after complaint to petitioner, a conference was held in May, 1970 by respondent with the chairman of petitioner's Grievance Committee and the complainant's attorney at which agreement was reached as to the amount of the unpaid balance due on these mortgages, which was approximately $9,300

and that respondent then agreed to pay this amount in installments so that payment in full would be completed in September 1970. Respondent complied substantially with the terms of that agreement and completed the payments within the time allowed. Neither complainant nor his attorney appeared or testified.

(f) On the record before me it appears that respondent was not personally obligated to pay either of these mortgages when acquired by complainant, but he did make payments personally prior to the complaint, and some of his checks were dishonored although ultimately after the complaint he did pay in full. I am unable to find any basis for holding that respondent was

guilty of professional misconduct as a lawyer in these transactions except to the extent that a lawyer should not issue checks when his bank balance is insufficient to cover them.

Respectfully Submitted,

J. BERTRAM WEGMAN

J.S.C.

BAR ASSOCIATION'S NOTICE OF MOTION TO CONFIRM REFEREE'S REPORT INSOFAR AS IT SUSTAINED ONE CHARGE, AND TO DISAFFIRM BALANCE OF REPORT INSOFAR AS IT FOUND THE REMAINING SIX CHARGES NOT TO HAVE BEEN PROVED (THE CHARGES, MADE BY FOUR COMPLAINANTS, ARE GROUPED IN THE NOTICE INTO FOUR CATEGORIES, BY COMPLAINANT)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of
Brooklyn Bar Association in respect of

FRANK R. MADERA

an attorney and counselor at law.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affirmation of MARSHALL G. KAPLAN, dated April 3, 1972, the undersigned will move this Court at a term thereof to be held at the Courthouse, Monroe Place and Pierrepont Street, Brooklyn, New York, on the 14th day of April, 1972 at 9:30 A.M. or as soon thereafter as

counsel can be heard, for an order confirming so much of the report of the HON. J. BERTRAM WEGMAN as sustained the petition with respect to complaint I and disaffirming so much of the report as relates to complaints II, III and IV of the petition and for such other, further and different relief as may be required in the premises and for such action with respect to the respondent as may be required by law.

Dated: Brooklyn, New York
April 3, 1972.

MARSHALL G. KAPLAN
Attorney for Petitioner
50 Court Street
Brooklyn, N.Y. 11201
UL 5-7728

TO:

JOSEPH SLAVIN, ESQ.
Attorney for Respondent
50 Court Street
Brooklyn, N.Y. 11201

STATEMENT, AFFIRMED BY ATTORNEY FOR BAR ASSOCIATION, IN SUPPORT OF FOREGOING MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF REFEREE'S REPORT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of
Brooklyn Bar Association in respect of

FRANK R. MADERA

an attorney and counselor at law.

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

The undersigned, an attorney admitted to practice in all Courts of New York State, under the penalties of perjury, states:

I am the attorney for the petitioner herein. This proceeding was initiated on the basis of four complaints made to petitioner's grievance committee. The justice reporting (HON. J. BERTRAM WEGMAN) has sustained the petition with

respect to Complaint I only. It is submitted that the allegations of the petition have been fully established and that so much of the report that holds to the contrary should be disaffirmed.

I

JACINTO FEBOS

The petition alleged that complainant gave respondent $150.00 each month from April 1, 1970 to September 1, 1970; that respondent having no special account, comingled these funds; that the money was not used for the purpose delivered and as a result a mortgage on complainant's house was foreclosed.

The justice reporting sustained the charge. In connection therewith he found false and untrue respondent's answer

to petitioner dated September 30, 1970 giving a version of the transactions different from the complainant's and his testimony before him to the same effect. As to three other items encompassed in respondent's answer to petitioner and his testimony the report concluded that respondent was false and untrue. Finally, it was found that respondent misused and converted the funds delivered to him.

II

MIRTES SOBRAL

After such unequivocal expressions as to respondent's credibility, the rest of the findings, particularly as to this complaint, are impossible to rationalize.

Respondent as Atlantic Capital Corp. purchased 511 and 519 Myrtle Avenue.

He thereafter conveyed the same property to complainant and Samuel Beinhart, Esq. as Rockaway Realty. The tangled skein of events was narrated by Beinhart, pages 106-152. In support of his testimony, he produced exhibits 8 through 17 consisting of various documents signed by respondent, notarized or recorded. They encompassed, deeds, letters, affidavits, bonds and the like. All were admitted into evidence without objection. The purport of all of this was that respondent had borrowed money from Beinhart; that as collateral he assigned mortgages on the Myrtle Avenue parcels; that the mortgages were fraudulent; that respondent then deeded over the properties and signed a confession of judgment. The judgment was filed in Nassau

County, executed upon and satisfied to the extent of $1000.00.

In response to this overwhelming mass of documentation, Madera testified that all of the Beinhart documents were signed by him in blank. Where notarized, this was also done in blank. The Alice in Wonderland tenor of his claim can best be illustrated by the following from pages 240-242 of the transcript:

"Q Now, Mr. Madera, you heard Beinhart testify Thursday, did you not?

A I did.

Q And did you, as a lawyer, understand that the purport of his testimony was that you had in your dealings with him done something wrong to him?

A Well, he so testified.

Q Well, did you understand the purport of his testimony to be that you had perpetrated a grand larceny?

A Yes.

Q And you are now telling us that he, in fact, perpetrated a grand larceny?

A Not only that, but that agreement he made and signed and had me sign was actually provided for over 36 per cent interest, as a felony.

Q Well, under these circumstances, Mr. Madera, do you have any explanation that you would want to make to the Court as to why Mr. Beinhart would make such an accusation against you?

A He is trying very hard to cover his position. He cannot get away from the fact that he prepared and signed that agreement.

Q Well, you haven't been pressing him by complaining to any authority about that agreement, have you?

A No.

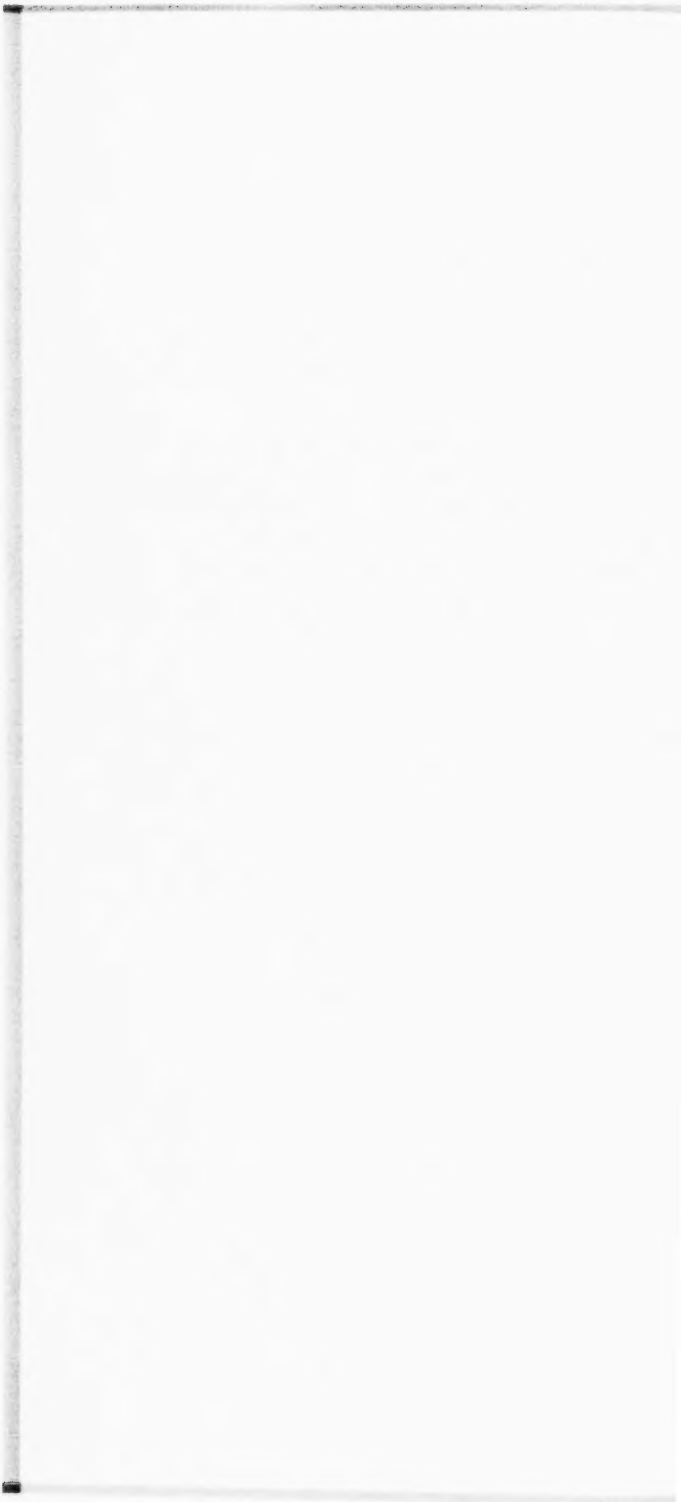
Q And at the time he testified he wasn't answering a complaint of any kind that you had made to anybody about him, was he?

A No.

Q And in fact the only explanation you can offer as to why he testified to such effect ---

A Well, I think that he wants to show that the papers were not in fact delivered to him in blank and that they were not notarized at his request in blank; he wants to cover that. He wants to cover the contents of his purchase back agreement or option, whatever he calls it, which actually provides for 36 per cent interest. It's a scheme, actually, because it is written on the face of the note at 18 per cent, but the way he works it out, it comes out to 36 per cent."

Although much of what respondent swore to was incredible he did admit that Sobral's complaint to petitioner was justified (240). He claimed that his signature was forged on exhibit 9 (246). Yet the record reveals that it was admitted without voir dire or objection (109). He did not claim that exhibit 16, partially



in his handwriting or exhibit 17, totally in his handwriting were forged (300).

It is submitted that in concluding that as between the two lawyers, respondent, the five time liar as to the first complaint, was the truthful one the justice reporting flew into the face of overwhelming evidence. Respondent, if he is to be believed, must be the most passive victim of a series of criminal indignities since Job. He lost the properties to Beinhart as a result of forgeries. He has an open judgment in the sum of $25,000.00 filed against via the same route. He seeks no redress. Indeed, pressed by the complaint to the petitioner (exhibit 18A) he does not excuse his travail by informing the grievance com-

mittee that he has been victimized by a forger (exhibit 18B). He just asks for time to straighten things out. Finally, when subpoenaed by the committee to testify, he, the victim, pleads his privilege against self-incrimination (273).

The other Sobral complaints were fully established by respondent's testimony (249 et seq) and exhibits 24-27, a series of rubber checks. In this connection, Justice Wegman reported that Sobral had never testified (report, page 10). He did not take note of the fact that since the inception of this proceeding Madera had talked to her several times, satisfied all of her complaints, didn't owe her a dime and thereby made her happy as a lark (260).

STATEMENT AFFIRMED BY ATTORNEY FOR BAR ASSOCIATION, IN SUPPORT OF FOREGOING MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF REFEREE'S REPORT

III

JOSEPH PEDRETTI

The Pedretti complaints were established by exhibits 29, 30 and 31. The complaint itself (exhibit 28A) was virtually admitted in respondent's answer (28B).

Justice Wegman both as to this complaint and the following one seems to be obsessed with a basic misconception of law. He views respondent's activities as a money manipulator on a different level as his activities with a client. No matter what his relationship to Pedretti, his conduct was unethical. He mortgaged property which he did not own and released a mortgage which was not assigned to him all in return for money.

STATEMENT AFFIRMED BY ATTORNEY FOR BAR ASSOCIATION, IN SUPPORT OF FOREGOING MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF REFEREE'S REPORT

IV

ANGELO CORTESE

This complaint likewise reveals a history of dishonored checks, juggled mortgages and defaulted payments. The complaint was overwhelmingly established by the testimony of Edward J. Connolly, Esq. (17-33). The reporting justice's conclusions (13-14) are incomprehensible in the face of the virtually uncontradicted evidence.

CONCLUSION

This respondent has been guilty of some very serious professional misconduct. It has been so extensive and so flagrant that adoption of the unfavorable portions of the report would work a serious miscarriage of justice. The evidence

STATEMENT AFFIRMED BY ATTORNEY FOR BAR ASSOCIATION, IN SUPPORT OF FOREGOING MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF REFEREE'S REPORT

is overwhelming. It is respectfully submitted that the petition should be sustained in toto and that this Court take such action against the respondent as justice may require.

Dated: Brooklyn, New York
April 3, 1972.

Marshall G. Kaplan.

STATEMENT, AFFIRMED BY FRANK R. MADERA, IN SUPPORT OF CROSS-MOTION TO CONFIRM REFEREE'S REPORT INSOFAR AS IT FOUND SIX (6) CHARGES NOT TO HAVE BEEN SUSTAINED, AND TO DISAFFIRM REPORT AND INSOFAR AS IT FOUND ONE CHARGE TO HAVE BEEN SUSTAINED.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

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In the Matter of the Petition of

Brooklyn Bar Association in respect to

FRANK R. MADERA

an attorney and counselor at law.

----------x

FRANK R. MADERA, Attorney at Law, admitted to practice in the State of New York, affirms pursuant to Rule 2106 of the Civil Practice Law and Rules as follows:

I am the Respondent in the above entitled disciplinary proceeding and submit this affirmation in support of my cross-motion seeking an order disaffirming a portion of the report of Hon. J. Bertram Wegman and confirming the balance thereof.

STATEMENT, AFFIRMED BY FRANK R. MADERA, IN SUPPORT OF CROSS-MOTION TO CONFIRM REFEREE'S REPORT INSOFAR AS IT FOUND SIX (6) CHARGES NOT TO HAVE BEEN SUSTAINED, AND TO DISAFFIRM REPORT AND INSOFAR AS IT FOUND ONE CHARGE TO HAVE BEEN SUSTAINED. (CONTINUED)

In this proceeding there were four items in the Petitioner's complaint. Judge Wegman found that my actions were improper insofar as they relate to the JACINTO FEBOS (designated as "I" in the complaint) and then proceeded to clear me from any wrong doing as far as MIRTES SOBRAL (designated as "II" in the complaint); JOSEPH PEDRETTI (designated as "III" in the complaint) and ANGELO CORTESE (designated as "IV" in the complaint).

The Petitioner has moved to affirm as to Item "I" and to disaffirm as to Items "II", "III", and "IV". This cross-motion, of course, takes the opposite view-point.

Rather than burdening the Court with an extensive affidavit reviewing the FEBOS testimony, there shall be submitted a memorandum on my behalf in which I shall specifically review the FEBOS situation and hopefully point out to the Court the errors made by Judge Wegman in finding against me on this one item. The difficulty during the Hearings concerning Mr. Febos was that this witness had to be interrogated through a Court interpreter and the Court will see in its review of the testimony that Mr. Febos' memory was, to say the least, very bad and that a great number of the questions that were posed to him were responded to by, "I do not remember". I wish to point out, however, that it is undisputed that no matter what Mr. Febos' testimony was, he did not suffer one dollars worth of monetary damages.

To review this matter away from an adversary proceeding where a lawyer's very "life" is at stake, would indicate that the situation which existed in relation to Mr. Febos should at the very most be deemed to have been a series of misunderstandings, basically because of a lack of communication between Mr. Febos and the people who held the mortgage on his home. The sum and substance and the outcome of this situation was that Mr. Febos retained title to his home free and clear of the mortgages which existed thereon.

I shall not at this time comment on charges "II", "III", and "IV" other than to state that in my viewpoint, Judge Wegman arrived at the proper conclusion in each of them and reference to these itmes will also be made in the memorandum.

Knowing that the Court will meticulously review the transcript of the Hearings, it is requested that the same be read as aforesaid in a dispassionate manner and that the Court should deny the Petitioner's motion and grant my motion.

It is requested that upon the granting of my motion, that this proceeding be dismissed.

Dated: Brooklyn, New York
April 19, 1972

Frank R. Madera

DECISION OF APPELLATE DIVISION (a) GRANTING BAR ASSOCIATION'S MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF THE REFEREE'S REPORT, BUT ONLY TO EXTENT INDICATED IN ACCOMPANYING OPINION, AND (b) DENYING MADERA'S CROSS-MOTION TO CONFIRM AND DISAFFIRM OTHER RESPECTIVE PORTIONS OF REPORT

No. 1411 In the Matter of Frank R. Madera, an attorney.

Brooklyn Bar Association, petitioner;

Frank R. Madera, respondent.

In this proceeding to discipline an attorney for professional misconduct, a report has been received by this court from the Justice of the Supreme Court to whom the issues had been referred for hearing and report. Petitioner now moves to confirm the report insofar as it found charge I to have been sustained and to disaffirm the report with respect to the remaining charges (II, III and IV) and respondent cross-moves to disaffirm the report insofar as it relates to charge I and to confirm the report in all other respects.

DECISION OF APPELLATE DIVISION (a) GRANTING BAR ASSOCIATION'S MOTION TO CONFIRM AND DISAFFIRM RESPECTIVE PORTIONS OF THE REFEREE'S REPORT, BUT ONLY TO EXTENT INDICATED IN ACCOMPANYING OPINION, AND (b) DENYING MADERA'S CROSS-MOTION TO CONFIRM AND DISAFFIRM OTHER RESPECTIVE PORTIONS OF REPORT. CONTINUED

Petitioner's motion granted to the extent indicated in the per curiam opinion rendered herewith and respondent's cross motion denied. Respondent is adjudged guilty of professional misconduct, he is disbarred and his name is ordered removed from the roll of attorneys and counselors-at-law, effective forthwith.

Opinion per curiam.

RABIN, P.J., HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ., concur.

June 14, 1972 IN RE MADERA, AN ATTY. No. 1411

OPINION OF APPELLATE DIVISION (WHICH, ACCORDING TO FOREGOING DECISION, LIMITS EXTENT OF DECISION), (a) GRANTING BAR ASSOCIATION'S MOTION "TO EXTENT INDICATED HEREIN" - NAMELY, CONFIRMING REFEREE'S REPORT INSOFAR AS IT FOUND ONE CHARGE TO HAVE BEEN SUSTAINED, AND DISAFFIRMING REPORT INSOFAR AS IT FOUND FOUR (4) CHARGES NOT TO HAVE BEEN PROVED (OF THE SIX WHICH THE REFEREE FOUND NOT TO HAVE BEEN PROVED), THE COURT THUS FINDING FIVE (5) CHARGES (OF THE SEVEN) TO HAVE BEEN SUSTAINED, (b) DENYING MADERA'S MOTION TO CONFIRM AND DISAFFIRM, (c) DIRECTING MADERA'S DISBARMENT BECAUSE OF HIS GUILT OF SAID FIVE (5) CHARGES; BUT (d) MAKING NO REFERENCE WHATSOEVER -LET ALONE DISPOSING OF - THE REMAINING TWO (2) CHARGES

June 14, 1972

SUPREME COURT, APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

RABIN, P.J., HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ.

In the Matter of

Frank R. Madera, an attorney.

Brooklyn Bar Association,

Petitioner;

Frank R. Madera,

Respondent.

Disciplinary proceeding instituted by the Brooklyn Bar Association. By order dated May 18, 1971, the issues were referred to Honorable J. Bertram Wegman, a Justice of the Supreme Court,

to hear and report.

Marshall G. Kaplan for petitioner.

Joseph Slavin for respondent.

Per Curiam. The respondent was admitted to practice law by this court on April 26, 1939. The petition sets forth four charges of professional misconduct, each of which arose out of a separate real estate transaction involving different individuals. The Justice of the Supreme Court to whom this matter was referred for hearing and report has submitted his report in which he found that only one of the four charges has been sustained (charge I). The petitioner now moves to confirm the report insofar as it found charge I to have been sustained and to disaffirm the report with respect to the remaining three charges (II, III and IV). The respondent cross-moves to disaffirm the report insofar as it relates to charge I and to confirm the report in all other respects.

The first of the four charges alleged that the complainant with respect to that charge made payments to the respondent to be applied on a mortgage on certain real property owned by the complainant; the respondent, who maintained no special, agency or escrow account, mingled these funds with his own; and the money so paid was not used by the respondent for the intended purpose, as a result of which the mortgage was foreclosed. We are in full accord with the reporting Justice's finding that this charge was sustained by the proof.

The second charge, in part, is that, for a consideration, certain real property was conveyed by a corporation, which the respondent controlled as the sole stockholder, to the complainant with respect thereto, subject to a purchase money mortgage. Neither the deed nor the mortgage was ever recorded. Thereafter, the vendor corporation conveyed

corporation which, as disclosed by the record, was contolled by another attorney to whom the respondent was personally indebted in a substantial amount. Notwithstanding the foregoing, the respondent collected from the complainant three payments due on the purchase money mortgage. The Justice concluded: "On the critical element of the charge on this complaint, (1) that respondent after conveying the property to * * * (the complainant) conveyed the same property to * * * (the second corporation); and (2) that as a result * * * (the complainant) has no interest in the property, I find the same not sustained for the reason that the conveyance to *** (the second corporation) is fraudulent and after full notice that the putative grantor had no title to convey, having theretofore conveyed to * * * (the complainant). This is not to say that I find the respondent blameless

for the complications, but I cannot find support for the charge made."

We do not agree with this finding. The substantitve issue in this proceeding is not whether, as a legal proposition, the complainant was divested of her interest in the property by the subsequent conveyance to the corporation, but rather whether the respondent failed to conduct himself in accordance with the standards imposed upon members of the Bar by attempting to convey property previously transferred to the complainant. In our opinion, the respondent's misconduct in this respect was fully established by the evidence adduced at the hearing. Similarly, concerning a further aspect of this second charge, the record is clear that, while acting as the complainant's attorney in a condemnation proceeding, the respondent gave her several checks for part of the award which were dishonored for insuff-

icient funds.

The third charge, in part, is that, in connection with the sale of a mortgage which the respondent, as president of a close corporation which he controlled, executed and delivered to the third complainant, the corporation did not own the subject property on the date of the sale and never had the right to mortgage the property. Contrary to the Justice's finding that there was "a failure of proof" as to this charge, it is our opinion that the charge was sustained by the proof, including certain exhibits introduced in evidence.

Finally, the fourth charge alleged, inter alia, that, although the fourth complainant advanced to the respondent $8,000 to invest in a mortgage on certain premises, the respondent, without the complainant's consent, invested the money in a mortgage covering another parcel of property and that the respondent

issued checks to the complainant which were dishonored because of insufficient funds. We find this charge to have been established.

Notwithstanding that the respondent made full restitution prior to the hearing, which perhaps explains the failure of the complainants to appear and testify, we find his testimony as to the last three charges as lacking in credibility and as untrustworhty as his explanations with respect to the first charge.

Accordingly, the petitioner's motion is granted to the extent indicated herein and the respondent's cross-motion is denied.

It is evident that without any mitigating circumstances the respondent has engaged in a consistent pattern of unethical practices. Moreover, his

flagrant activities are not to be measured by the standards of the marketplace alone. His conduct, while in some instances not involving an attorney-client relationship, d o e s reflect on the reputation of the Bar (Matter of Ushkow, 34 A D 2d 159). "While a lawyer may engage in business, if he wishes to remain a member of the Bar he must conduct himself in that business in accordance with the standards imposed on members of the Bar" (Matter of Kaufman, 29 A D 2d 298, 299). The respondent is adjudged guilty of serious professional misconduct and should be disbarred from the further practice of law and his name removed from the roll of attorneys and counselors-at-law, effective forthwith.

RABIN, P.J., HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ., concur.

ORDER OF DISBARMENT (a) FINDING MADERA GUILTY OF ALL SEVEN (7) CHARGES, AND (b) DIRECTING HIS DISBARMENT BECAUSE OF HIS GUILT OF SAID CHARGES, (c) NOTWITHSTANDING THE FACT THAT THE DECISION (AS LIMITED BY THE OPINION, ACCORDING TO THE DECISION), TO WHICH THE ORDER OF DISBARMENT PURPORTS TO CORRESPOND, (1) FINDS MADERA GUILTY OF ONLY FIVE (5) CHARGES, (2) DIRECTS HIS DISBARMENT BECAUSE OF HIS GUILT OF SAID CHARGES, BUT (3) MAKES NO REFERENCE TO -LET ALONE DISPOSES OF - THE REMAINING TWO (2) CHARGES

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 14, 1972

HON. SAMUEL RABIN, Presiding Justice

HON. JAMES D. HOPKINS

HON. FRED J. MUNDER

HON. HENRY J. LATHAM

HON. J. IRWIN SHAPIRO

----------x

In the Matter of

Frank R. Madera, an attorney.

Brooklyn Bar Association, :

Petitioner; Order of Disbarment

Frank R. Madera,

Respondent.

ORDER OF DISMARMENT (CONTINUED)

A disciplinary proceeding having been instituted in this court upon the petition of the Brooklyn Bar Association in respect to Frank R. Madera, an attorney and counselor at law who was admitted to practice by this court on April 26, 1939; the petition praying that the respondent Frank R. Madera be disciplined for professional misconduct upon the charges therein set forth; the said proceeding having come on to be heard by a notice of motion, dated January 25, 1971; and respondent having filed his answer to the petition; this court by order dated May 18, 1971, having referred the issues raised by the pleadings to the Honorable J. Bertram Wegman, a Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues; the said Justice thereafter having held hearings and having filed his

report with this court on March 3, 1972, together with the exhibits and the typewritten transcript of the stenographic minutes of the hearings; and petitioner having moved by notice of motion, dated April 3, 1972, to confirm the report insofar as it found charge I to have been sustained and disaffirm the report with respect to the remaining charges (II, III and IV); and respondent having cross moved, by notice of cross motion, dated April 19, 1972, to disaffirm the report insofar as it relates to charge I and to confirm the report in all other respects;

NOW, upon the petition verified January 25, 1971; the answer verified May 6, 1971; the typewritten transcript of the stenographic minutes of the hearings; the exhibits, the report of Mr. Justice Wegman, dated March 3, 1972; the said notices of motion, the affirmation of Marshall G. Kaplan in support of petitioner's motion; the affirmation and

memorandum of Joseph Slavin and affirmation of Frank R. Madera in support of the cross motion ; and upon all the papers filed herein; and upon the decision and the per curiam opinion of the court herein, dated June 14, 1972, heretofore filed and made a part hereof; and Marshall G. Kaplan, Esq., having appeared of counsel for respondent; and due deliberation having been had thereon; it is unanimously:

ORDERED that petitioner's motion insofar as it is to confirm the report and the finding as to Charge I is hereby granted; and petitioner's motion insofar as it is to disaffirm the report and the findings as to Charges II, III and IV is hereby granted, and those charges are hereby found to have been established; and it is further

ORDERED that the respondent's cross motion is hereby denied, and it is further

ORDER OF DISBARMENT (CONTINUED)

ORDERED that the respondent FRANK R. MADERA, effective June 14, 1972, be and he hereby is disbarred from the practice of the law, and his name is hereby directed to be struck from the roll of attorneys and counselors at law; and it is further

ORDERED and DIRECTED that respondent FRANK R. MADERA shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys - a copy of such rules beings annexed hereto and made a part hereof; and it is further

ORDERED, pursuant to statute (Judiciary Law, §90), that effective June 14, 1972, FRANK R. MADERA, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or as agent, clerk, or employee of another;

(2) from appearing as attorney or counselor at law before any court, judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at Law.

Enter:

Clerk of the Appellate Division

.....

(Portion omitted is a copy of the court's rules - attached to the order of disbarment and made part thereof - regulating the conduct of disbarred attorneys (see next to last paragraph of order of disbarment).

DECISION GRANTING MADERA'S MOTION STAYING EFFECT OF ORDER OF DISBARMENT, TO EXTENT OF STAYING EFFECT OF SAME TO JULY 14, 1972

No. 2080 In the Matter of Frank R. Madera, an Attorney.

Brooklyn Bar Association, petitioner;
Frank R. Madera, respondent.

Motion by respondent to stay the effective date of his disbarment. The disbarment, by order of this court dated June 14, 1972 was therein made effective forthwith.

Motion granted to the extent of staying the effective date of respondent's disbarment to July 14, 1972.

RABIN, P.J., HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ., concur.

ORDER FORMALIZING IMMEDIATELY PRECEEDING DECISION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 21, 1972

HON. SAMUEL RABIN, Presiding Justice
HOM. JAMES D. HOPKINS
HON. FRED J. MUNDER
HON. HENRY J. LATHAM
HON. J. IRWIN SHAPIRO

----------x

In the Matter of
Frank R. Madera, an attorney.

:

Brooklyn Bar Association,

Petitioner; : Order Amending order

Frank R. Madera,

Respondent. :

----------x

In the above disciplinary proceeding, this court by its decision and order of June 14, 1972, having directed that the respondent Frank R. Madera be disbarred and his name struck from the roll of attorneys effective June 14, 1972; and respondent having moved to stay the effective date of his disbarment;

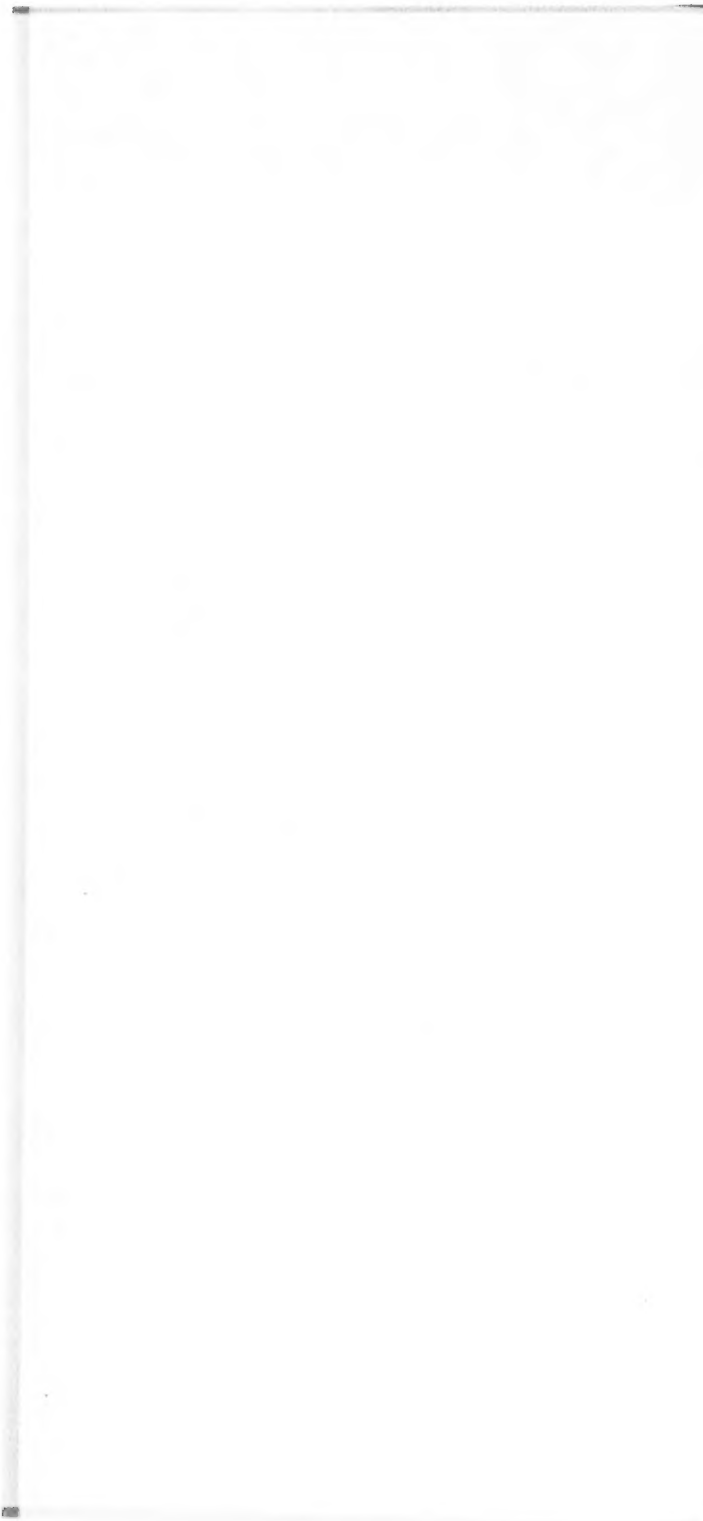
Now, upon the order to show cause, dated June 19, 1972, the affidavit of

Frank R. Madera in support of said motion; the affirmation of Marshall G. Kaplan in opposition thereto; the motion having been submitted and due deliberation having been had thereon; it is;

ORDERED that the said motion is hereby granted to the extent of amending the order dated June 11, 1972 so as to change and postpone the effective date of such disbarment to July 14, 1972.

Enter:

Clerk of the Appellate Division



EXCERPTS FROM MADERA'S MOTION TO VACATE ORDER OF DISBARMENT ON THE GROUND OR GROUNDS, AMONG OTHERS, OF DIVERS CONSTITUTIONAL INFIRMITIES.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of :

FRANK R. MADERA, :

An Attorney, :

BROOKLYN BAR ASSOCIATION, : ORDER TO SHOW CAUSE

Petitioner, :

FRANK R. MADERA, :

Respondent. :

Upon the annexed affidavit of FRANK R. MADERA, duly sworn to thel/th day of July, 1972.

LET the petitioner, by its attorney, MARSHALL G. KAPLAN, Esq., show cause before this Court, at a term for motions thereof, to be held at the Courthouse, 45 Monroe Place, Brooklyn, New York City, on the 14 day of July, 1972 at 9:30 M. in the fore-noon of that day, or as soon thereafter as counsel can be heard, why an order should not be made.

(1) Vacating the order of disbarment herein, dated June 14, 1972 (as amended by order dated June 21,1972, so as to make

the disbarment effective July 14, 1972), on the ground or grounds that it is void for, among other reasons, want of jurisdiction, and due process (the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the Constitution of the State of New York), and also frustrates respondent's right of appeal to the Court of Appeals, in that

(A) the order of disbarment is in direct, material and irreconcilable conflict with the accompanying decision-opinion for disbarment, resulting from the fact that the order of disbarment contains material findings in addition to those made by the decision-opinion, and directs disbarment of respondent for reasons in addition to those stated in the decision-opinion, in that while the order of disbarment (a) finds all

the charges in the petition which were referred to the Referee and heard and reported on by him, to have been established - seven (7) charges in all, labeled in the petition as Charges I (one charge), II (three separate charges), III (two charges), and IV (one charge), and in the Referee's report as I (one charge), II (1) (three charges), II (2) (two charges), and II (3) (one charge) - and (b) directs that respondent be disbarred because of his guilt of said charges (seven in all), the opinion-decision, on the other hand - which also labels the charges as I, II, III and IV, but refers to them as being "four" in number - (c) makes reference to and discusses only five (5) of the seven (7) charges, (i.e., Charge I: one charge; Charge II, but only two of the three charges embraced in said Charge - namely, petition, pp. 2-3, Charge II, entitled

"Re 511/529 Myrtle Avenue", pars. "A" - "G"; and petition, p. 3, entitled "Re 409 Bristol Street", Charge II, pars. "H" - "L"; Charge III: but only one of the two charges subsumed under said Charge - namely, petition, p. 4, Charge III, "Re: 472 Warren Street", pars. "A" - "D" and Charge IV (one charge); (d) the decision-opinion is silent as to the remaining two charges (i.e., petition, p.4, third charge of Charge II, entitled "Re: 689 President Street", pars. "M", "N" and "O", and petition, pp. 4-5, second charge of Charge III, entitled "Re: 270 Prospect Park West", pars, "E", "F", "G" and "H"), and is also silent, as well, concerning the Referee's report and findings respecting said two charges (findings, incidentally, which were in respondent's favor); (e) the

decision-opinion also fails to dispose of petitioner's motion and respondent's cross-motion to confirm the report and findings as to said two charges; and (f) directs respondent's disbarment because of his guilt of said five (5) charges, not seven (7), as the order disbarment does, with the result that the order of disbarment disbars respondent because of his guilt on two charges (the two said still undisposed of charges) as to which, as well as the Referee's report and findings as to which, together with the petitioner's motion to disaffirm the report and findings as to which, and the respondent's cross-motion to confirm as to which, the decision-opinion is silent and takes no action;

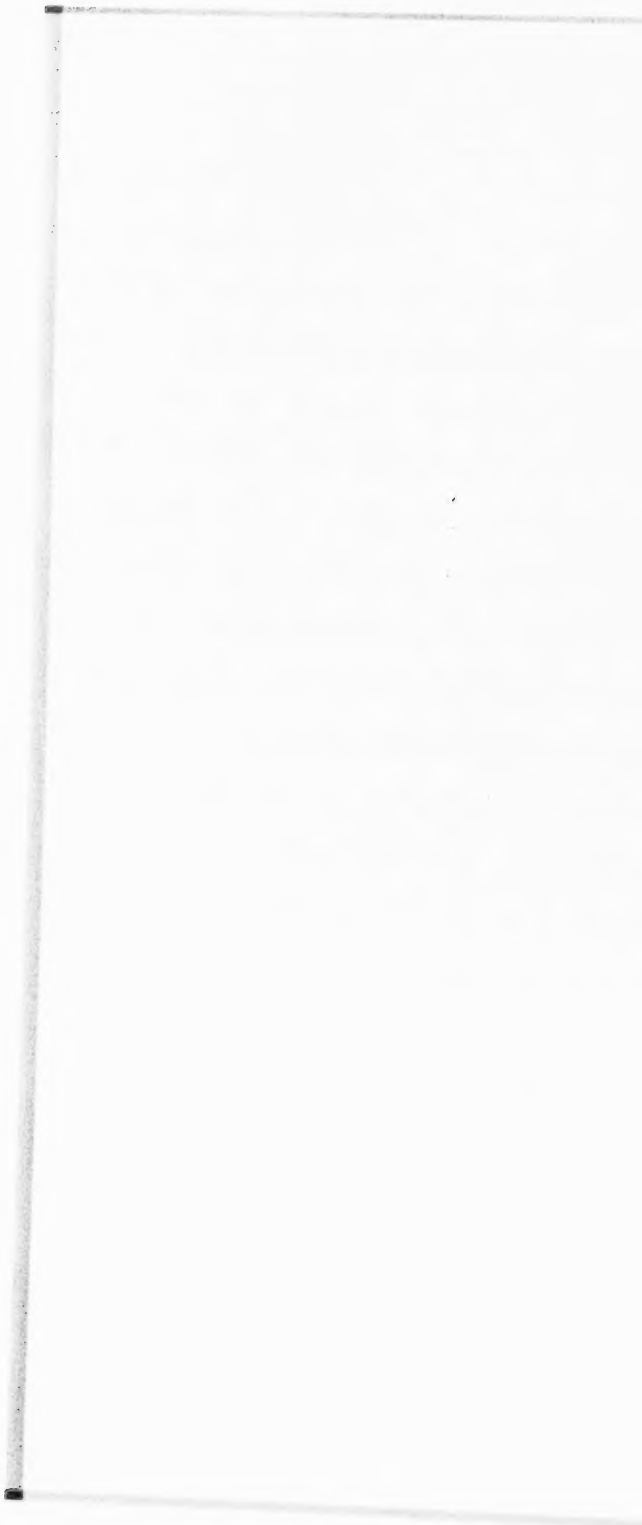
EXCERPTS FROM MADERA'S MOTION TO VACATE ORDER OF DISBARMENT ON THE GROUND OR GROUNDS, AMONG OTHERS, OF DIVERS CONSTITUTIONAL INFIRMITIES.

(CONTINUED)

(B) vacating the order of disbarment for want of jurisdiction, and violation of the said due process clause, for the separate and additional reason that, since it enumerates the decision-opinion as being one of the papers upon which it is based, and the order and decision-opinion are in hopeless conflict with each other, the order is, for the reasons set forth under "(A)" directly above, materially self-contradictory and thus in violation of the said due process clause because it is "void for vagueness", a doctrine which applies to civil proceedings, as well as criminal;

.....

(4) Upon the reargument and renewal referred to in "(4)" directly above, denying petitioner's motion to disaffirm and granting respondent's cross-motion to



confirm the Referee's report and findings as to said still undisposed of two charges, and modifying the order of disbarment and decision-opinion, by dismissing said two charges, on the ground that respondent's Fifth Amendment rights (Spevack v. Klein, 385 U.S. 511. Matter of Zuckerman, 23 A.D. 2nd 825, v vacated and remanded, 386 U.S. 15; mod., 27 A.D. 2nd 848, affd. 20 N.Y. 430) were violated, when (a) petitioner, who had not produced any evidence concerning said two charges - as well as certain other charges (see "5" directly below) - called respondent as its witness to furnish the evidence as to said two charges (as well as certain other charges; see "5" directly below), (b) respondent, before he took the stand, indicated his desire and intention- since the facts involved in said two charges (as well as in the said certain other

charges; see "6" directly below) could be made the subject of criminal proceedings - to invoke the Fifth Amendment, and to refuse to take the stand as petitioner's witness and furnish the requested evidence, (c) the Referee advised respondent that if he did so, he (respondent) would suffer the consequences of so doing, in that the Referee would draw inferences concerning said two charges (as well as certain other charges on which no evidence had, as in the case of said two charges, also not yet been produced; see item "5" directly below) which would be unfavorable to respondent; (d) respondent, under constraint and compulsion of the Referee's ruling and threat, gave evidence as to said two charges, as well as concerning certain other charges on which no evidence, as in the case of said two charges, had also not been produced (see "5" directly below);

(5) Granting reargument of petitioner's motion to disaffirm and respondent's motion to confirm, the Referee's report and findings as to the second charge embraced in Charge II (petition, p. 3, "Re: 409 Bristol Street, pars. "H" - "L"), and the first charge set forth in Charge III (petition, p. 4, "Re: Warren Street, pars. "A" - "D") and granting respondent leave to renew his cross-motion aforesaid, to said extent, and modifying the order of disbarment and the decision-opinion pro tanto, by dismissing said charges for the reasons stated in "(5)" directly above in support of dismissing the third charge contained in Charge II (petition, pp. 4-5, "Re: 270 Prospect Park West", pars, "E" - "H") - namely, violation of respondent's Fifth Amendment right

to remain silent with respect to charges as to which no evidence had been introduced;

(6) Granting reargument of (a) petitioner's motion to confirm the Referee's report and findings as to Charge I, and to disaffirm the balance of said report and the remaining findings, and of (b) respondent's cross-motion to disaffirm the Referee's report as to Charge I, and to confirm the balance of said report and the remaining findings, and granting respondent leave to renew respondent's cross-motion, and vacating the order of disbarment and decision-opinion, by dismissing the petition and vacating the order of reference, on the ground that said orders, decision-opinion, and proceedings were and are

premature, and void for want of jurisdiction and due process, and were taken in contravention of respondent's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of New York, to respondent's serious prejudice, in that petitioner, contrary to law, failed to accord to respondent, although required so to do (see petition, par. "Third") the following procedural rights, in accordance not only with petitioner's by-laws regulating preliminary investigations- which are "judicial proceedings", in which the members of petitioner's Grievance Committee act as a "quasi-judicial body" and, as such, as an arm of this

Court (Wiener v. Weintraub, 22 N.Y. 2d 330, 331, 332) - but also in accordance with the long-settled and established practice followed in the Second Department; which procedural rights, insofar as the said Constiutions and their equal protection clauses are concerned, were, prior to the establishment of same, not required by either of said Constitutions or equal protection clauses to be accorded to attorneys against whom charges were made, but, following the establishment of said rights, and because of the long-settled practice in the Second Department of vouchsafing said rights to such attorneys, said rights were required to be granted to respondent by said Constitutions protection and their equal protection clauses, said procedural rights, of which respondent was deprived, being the following:

(7) Granting respondent leave to reargue (a) petitioner's motion to confirm the Referee's report and findings as to Charge I, and to disaffirm the balance of said report and the remaining findings, and (b) respondent's cross-motion to disaffirm said report and findings as to Charge I, and to confirm the balance of said report and the remaining findings, and granting leave to respondent to renew said cross-motion, and vacating the order of disbarment and decision-opinion, and dismissing the petition and vacating the order of reference, and vacating the order of disbarment and decision-opinion, and dismissing the petition and vacating the order of reference, and transferring the matter herein to an Appellate Division of another Department, pursuant to CPLR 5711, for preliminary investigation,

on the ground that all said proceedings were and are void for want of jurisdiction and due process, because the proceedings taken by petitioner's Grievance Committee, following the filing of a complaint and respondent's answer thereto (by-laws, Article XI, Section 2, "b"), in connection with the matters later embraced in Charge IV, (petition, p. 8; Complaint of Albert K. Gins, on behalf of Angelo Cortest), - proceedings which are "judicial proceedings" (Wiener v. Weintraub, 22 N.Y. 2nd 330, 331-332) - were void because they were taken notwithstanding the fact that the Committee on Grievances of petitioner - a "quasi-judicial body" (Wiener v. Weintraub, 22 N.Y. 2nd 330, 331) - was disqualified to judge the complaints against respondent, by reason of the fact that, in connection with the complant of Albert R. Gins, made on

behalf of Angelo Cortese (petition, p. 5, Charge IV) following the making of an agreement between respondent and the complainant, at a conference with the Chairman of petitioner's Grievance Committee, Edward J. Connolly, Esq., settling the monetary claims of the complainant against respondent in the sum of $ to be paid in instalments, the said Chairman, Edward J. Connolly, acting as a member of petitioner's Grievance Committee, as well as on behalf of said Committee, regularly and systematically, as each of the instalments (except the first) fell into arrears, personally enforced collection of said instalment, by repeatedly personally telephoning, and having his secretary telephone, respondent to remit said instalments, until all said instalments were paid, acting,

in effect, as the complainant's attorney or counsel, with the result that said Chairman, Edward J. Connolly, Esq., as well as the Committee on Grievances, on whose behalf he was acting - a "quasi-judicial body" (Wiener v. Weintraub, 22 N.Y. 2nd 330, 331-332) - was thereafter disqualified from judging and voting on the complaints against respondent - said Edward J. Connolly, Esq. voted, with the other members of the Grievance Committee, to recommend prosecution of the complaints against respondent - by reason of Judiciary Law, Section 14, prohibiting a judge (a term which includes a quasi-judicial officer) from sitting as such, or taking any part in the decision of, an action, claim, matter, motion or proceeding in which he has been attorney or counsel - a

ground of disqualification which renders all the proceedings void (notwithstanding consent orwaiver) in connection with which he first acted, in effect, as attorney and counsel for a party, and then as judge, since the purpose of the statute is to afford to every litigant, including respondent, a fair and impartial judge - with the result that the quasi-judicial body, of which he is a member, and on whose behalf he acted in so enforcing collection, and with the other members of which he consulted, deliberated and voted, as a judge (petitioner's Grievance Committee) was also disqualified to judge and vote on the complaints against respondent, so that the proceedings taken by petitioner, subsequent to the filing of the complaint and respondent's answer with its Grievance Committee, including the

EXCERPTS FROM MADERA'S MOTION TO VACATE ORDER OF DISBARMENT ON THE GROUND OR GROUNDS, AMONG OTHERS, OF DIVERS CONSTITUTIONAL INFIRMITIES, (CONTINUED)

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proceedings in this Court, were and are void for want of jurisdiction because of the provisions of Judiciary Law, Section 14, as well as because of the provisions of the due process clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of New York:

.....

LET service of a copy of this order to show cause, and of the papers upon which it is based,upon the petitioner, by its attorney, MARSHALL G. KAPLAN, Esq., 50 Court Street, Brooklyn, New York, by 3 P.M. on the 11 day of July, 1972, be sufficient.

Dated: Brooklyn, N.Y.
July 11, 1972

Justice of the Supreme Court, Appellate Division, Second Department

DECISION DENYING MADERA'S MOTION TO VACATE ORDER OF DISBARMENT.

No. 2389. In the Matter of Frank R. Madera, an attorney.

Brooklyn Bar Association, petitioner; Frank R. Madera, respondent.

Motion by respondent to vacate order of disbarment and for other relief.

Motion denied in all respects.

RABIN, P.J., HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ., concur.

ORDER DENYING MADERA'S MOTION TO VACATE ORDER OF DISBARMENT.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 21, 1972

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. FRED J. MUNDER) Associate Justices
HON. HENRY J. LATHAM)
HON. J. IRWIN SHAPIRO)

----------x

In the Matter of :
Frank R. Madera, an attorney. : Order on motion
:
Brooklyn Bar Association, :
:
Petitioner; :
:
Frank R. Madera, :
:
Respondent.
----------x

In the above disciplinary proceeding, this court by its opinion, decision and order dated June 14, 1972, having granted petitioner's motion to confirm and disaffirm the Justice's report and having directed that the respondent Frank R. Madera be disbarred and that effective June 14, 1972, the respondent Frank

R. Madera desist and refrain from the practice of the law; and the respondent having moved by order to show cause, dated July 11, 1972 to vacate order of disbarment and for other relief;

NOW, on reading and filing the order to show cause; the affidavits of Frank R. Madera in support of said motion; the affirmation of Marshall G. Kaplan in opposition thereto; the said motion having been duly submitted; upon all the papers filed and upon all the proceedings heretofore had herein; and due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is:

ORDERED that the motion to

vacate order of disbarment and for other relief is hereby denied in all respects.

Enter:

Irving N. Selkin

Clerk of the Appellate Division

MADERA'S NOTICE OF MOTION IN APPELLATE DIVISION FOR LEAVE TO APPEAL TO COURT OF APPEALS FROM ORDER OF DISBARMENT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

In the Matter of

FRANK R. MADERA,

An Attorney

BROOKLYN BAR ASSOCIATION,

Petitioner,

FRANK R. MADERA,

Respondent.

----------x

RESPONDENT'S NOTICE OF MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of FRANK R. MADERA, sworn to the 10th day of July, 1972, and all the papers and proceedings heretofore filed and had herein, respectively, the under-

signed will move this Court, at a term for motions thereof, to be held at the Courthouse, 45 Monroe Place, Borough of Brooklyn, City and State of New York, on the 4th day of Aug., 1972, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order

a) granting respondent, pursuant to CPLR 5513(c) and 5516, permission to appeal to the Court of Appeals from the order of this Court, dated June 14, 1972, disbarring respondent (as amended by order dated June 21, 1972, so as to make the disbarment effective July 14, 1972);

b) staying the said order, as so amended, pursuant to CPLR 5519(c),

pending the determination of the appeal taken pursuant to leave to appeal (if same be granted); and

c) granting such other, further and different relief as to this Court may seem just and proper.

Dated: New York, New York
July 20, 1972

Yours, etc.

FRANK R. MADERA
Respondent in person
16 Court Street
Brooklyn, New York
11242
Tel.:(212) TR 5-4170

TO:
MARSHALL G. KAPLAN, Esq.
50 Court Street
Brooklyn, New York 11242

AFFIDAVIT IN SUPPORT OF MADERA'S MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

In the Matter of

FRANK R. MADERA,

An Attorney

BROOKLYN BAR ASSOCIATION,

Petitioner,

FRANK R. MADERA,

Respondent.

----------x

AFFIDAVIT

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

FRANK R. MADERA, being duly sworn, deposes and says:

Your deponent is the respondent in the within proceeding,

and makes this affidavit in support of an application for an order,

a) granting respondent, pursuant to CPLR 5513(c) and 5516, permission to appeal to the Court of Appeals from the order of this Court, dated June 14, 1972, disbarring respondent (as amended by order dated June 21, 1972, so as to make the disbarment effective July 14, 1972);

b) staying the said order, as so amended, pursuant to CPLR 5519(c), pending the determination of the appeal taken pursuant to said leave to appeal (if same be granted); and

c) granting such other, further and different relief as to this Court may seem just and proper.

Your deponent was served with a copy of the order of disbarment, with notice of entry thereof, on June 20, 1972, so that the application herein, being made July 20, 1972, is timely. CPLR 5513(c).

On July 13, 1972, in connection with your deponent's reply to petitioner's affidavit submitted in opposition to deponent's motion, returnable July 14, 1972 (still pending undetermined as of this writing), to vacate the order of disbarment, etc., deponent, in item "3" of his affidavit sworn to July 13, 1972 (pp. 1, 8), requested leave to appeal to the Court

of Appeals from the order of disbarment (as amended as aforesaid).

The within application for said leave is being made by formal motion, pursuant to CPLR 5516 and 5513(c).

The application herein is based upon all the grounds advanced in your deponent's moving affidavit, sworn to July 11, 1972, filed in support of his motion to vacate the order of disbarment, etc., as well as those advanced in his reply affidavit - memorandum of law, and request for leave to appeal, sworn to July 13, 1972, with respect to those aspects of said grounds which do not directly involve the construction of the constitution of the state or of

the United States. Cf. CPLR 5601 (b) (1). Those aspects of said grounds which do involve said construction are the subject of an appeal from the order of disbarment to the Court of Appeals, taken by dependent, on July 11, 1972, as of right, in connection with which deponent is seeking a stay from this Court of the order of disbarment, pursuant to CPLR 5519(c), pending the determination of that appeal (item "8" of respondent's motion to vacate order of disbarment).

Frank R. Madera

Sworn to before me this
20th day of July, 1972

BENJAMIN JAFFE
Notary Public, State of N.Y.

DECISION DENYING MADERA'S MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

No.2603 In the Matter of Frank R. Madera, an attorney.

Brooklyn Bar Association, petitioner;
Frank R. Madera, respondent.

Motion by respondent, a disbarred attorney, for leave to appeal to the Court of Appeals from an order of this Court, dated June 14, 1972, as amended by order, dated June 21, 1972; and to stay said order as amended in the event leave be granted to appeal to said Court.

Motion denied in all respects.

RABIN, P.J., MUNDER, LATHAM, CHRIST and BENJAMIN, JJ., concur.

ORDER DENYING MADERA'S MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

At a Term of the Appellate Division of the State of New York, Second Judicial Department, held in Kings County on August 29, 1972

HON. SAMUEL RABIN, Presiding Justice

HON. FRED J. MUNDER)
HON. HENRY J. LATHAM)Associate
HON. MARCUS G. CHRIST) Justices
HON. A. DAVID BENJAMIN)

----------x

In the Matter of
Frank R. Madera, an attorney.

Brooklyn Bar Association,

Petitioner;

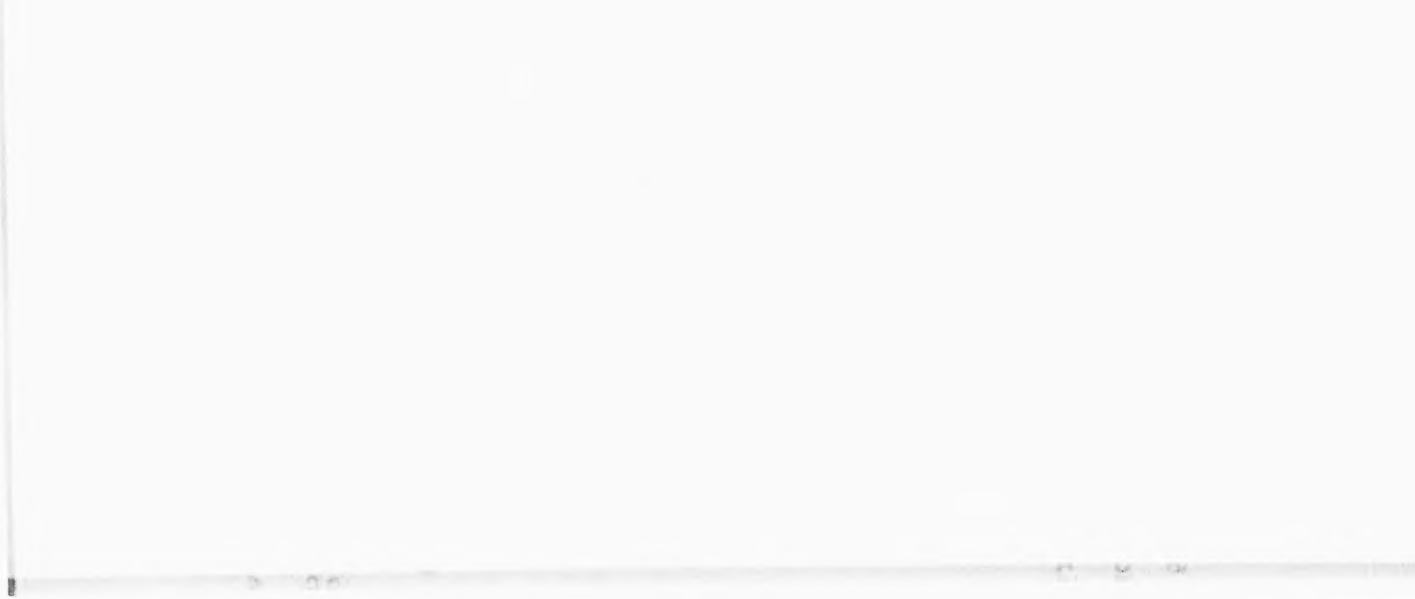
Frank R. Madera,

Respondent.

----------x

Order on motion

In the above disciplinary proceeding, this court by its opinion, decision and order dated June 14, 1972, as amended by order, dated June 21,



1972, having directed that the respondent Frank R. Madera be disbarred from the practice of the law; and respondent having moved by notice of motion, dated July 20, 1972, for leave to appeal to the Court of Appeals from order of this court dated June 14, 1972, as amended by order, dated June 21, 1972; and to stay said order as amended in the event leave be granted to appeal to said court;

Now, upon reading and filing said notice of motion; the affidavit of respondent in support of said motion; the affirmation of Marshall G. Kaplan in opposition thereto; the said motion having been duly submitted; upon all

the papers filed and upon all the proceedings heretofore had herein; and due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is:

ORDERED that the motion for leave to appeal to the Court of Appeals and for a stay is hereby denied in all respects.

Enter:

Irving N. Selkin

Clerk of the Appellate Division

MADERA'S NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF DISBARMENT, TAKEN AS OF RIGHT ON CONSTITUTIONAL QUESTIONS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

- -x

In the Matter of

FRANK R. MADERA,

An Attorney

BROOKLYN BAR ASSOCIATION,

Petitioner,

FRANK R. MADERA,

Respondent.

- -x

Respondent's notice of appeal to Court of Appeals, on constitutional questions, pursuant to CPLR 5601(b) (1).

S I R :

PLEASE TAKE NOTICE that the respondent herein, FRANK R. MADERA, herewith appeals to the Court of Appeals of the State of New York,

pursuant to CPLR 5601(b)(1). from the order of this Court, dated June 14, 1972 (as amended by order of this Court, dated June 21, 1972, so as to make the order dated June 14, 1972 effective July 14, 1972), which (1) granted the motion of petitioner herein, BROOKLYN BAR ASSOCIATION, (a) to confirm the report and findings of the Referee as to Charge I (one charge, found by the Referee to have been established), and (b) to disaffirm the Referee's report and findings as to Charge II (consisting of three separate charges made by the same complainant, one MIRTES SOBRAL), Charge III (two separate charges made by the same complainant, one JOSEPH

PEDRETTI), and Charge IV (one charge) all found not to have been established; (2) denied the cross-motion of respondent herein, FRANK R. MADERA, (a) to disaffirm the Referee's report and findings as to Charge I, and (b) to confirm the Referee's report and findings as to Charges II (three charges), Charge III (two charges) and Charge IV (one charge); (3) found all said charges - seven (7) in number - to have been established; (4) disbarred the respondent herein, FRANK R. MADERA (because of his guilt of all said seven (7) charges), and directed that his name be struck from the roll of attorneys and counsellors at law; and (5) ordered and directed the respondent herein,

FRANK R. MADERA, to execute certain acts recited in said order, and to refrain from other acts recited therein, all in implementation of said order.

PLEASE TAKE FURTHER NOTICE that the decision-opinion of this Court, dated June 14, 1972 - rendered simultaneously with the order described above, which order disposed of, or purported to dispose of, petitionerer's motion and respondent's cross-motion, addressed to the Referee's report and findings, in their entirety, and disbarred respondent - did not, in fact, contrary to the recitals in said order of disbarment, pass upon the Referee's report and findings as to two of the seven charges (one being Charge II,

pars. "M", "N" and "O", of the petition, pp. 3-4, and dealt with in the Referee's report in Section II(1)(j), at pp. 10-11; the other being Charge III, pars. "E", "F", "G" and "H", of the petition, pp. 4-5, and dealt with in the Referee's report in Section 2(c) and (d), at pp. 11-12 thereof), nor did the said decision-opinion dispose of the petitioner's motion and cross-motion, addressed to the Referee's report and findings, insofar as said motion and cross-motion related to the Referee's report and findings with respect to the said two charges, nor did the said decision-opinion contain any findings or conclusions as to either the Referee's report and findings as to said two

charges, or respondent's guilt or innocence of either or both said two charges, nor, in fact, did said opinion-decision contain any reference whatsoever to said charges, or either of them.

Dated: Brooklyn, New York
July 10, 1972

Yours, etc.,

FRANK R. MADERA
Respondent in person
16 Court Street
Brooklyn, N.Y.11242
Tel.:(212) TR 5-4170

TO:
MARSHALL G. KAPLAN, Esq.
Attorney for petitioner
50 Court Street
Brooklyn, N.Y. 11242
Tel.: (212) UL 5 - 7728

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT

COURT OF APPEALS
STATE OF NEW YORK
----------x

In the Matter of :

FRANK R. MADERA, an Attorney, :

BROOKLYN BAR ASSOCIATION, :AFFIRMANT'S STATEMENT

Petitioner-Respondent, :

vs. :

FRANK R. MADERA, :

Respondent-Appellant. :
----------x

(p. 1) ALEX A. BOHM, duly affirms as follows, under the penalties of perjury:

Your affirmant is an attorney and counsellor-at-law, and the attorney for respondent-appellant on this appeal. A copy of the notice of appeal is Exhibit "C", attached hereto at pp. to , infra.*

*All references to pages in connection with exhibits should be ignored. The exhibits are arranged alphabetically, and are readily located.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

The within statement is submitted in support of an application for an order of this Court,

(1) Staying, pursuant to CPLR 5519(c), the operation and effect of the order of the Appellate Division, Second Department, dated June 14, 1972, disbarring respondent-appellant herein (as amended by order of said court, dated June 21, 1972, so as to make the disbarment effective July 14, 1972), pending the determination of the appeal to this Court from said order of disbarment (as so amended), taken by respondent-appellant herein on July 10, 1972, pursuant to CPLR 5601 (b)(1), on constitutional questions,

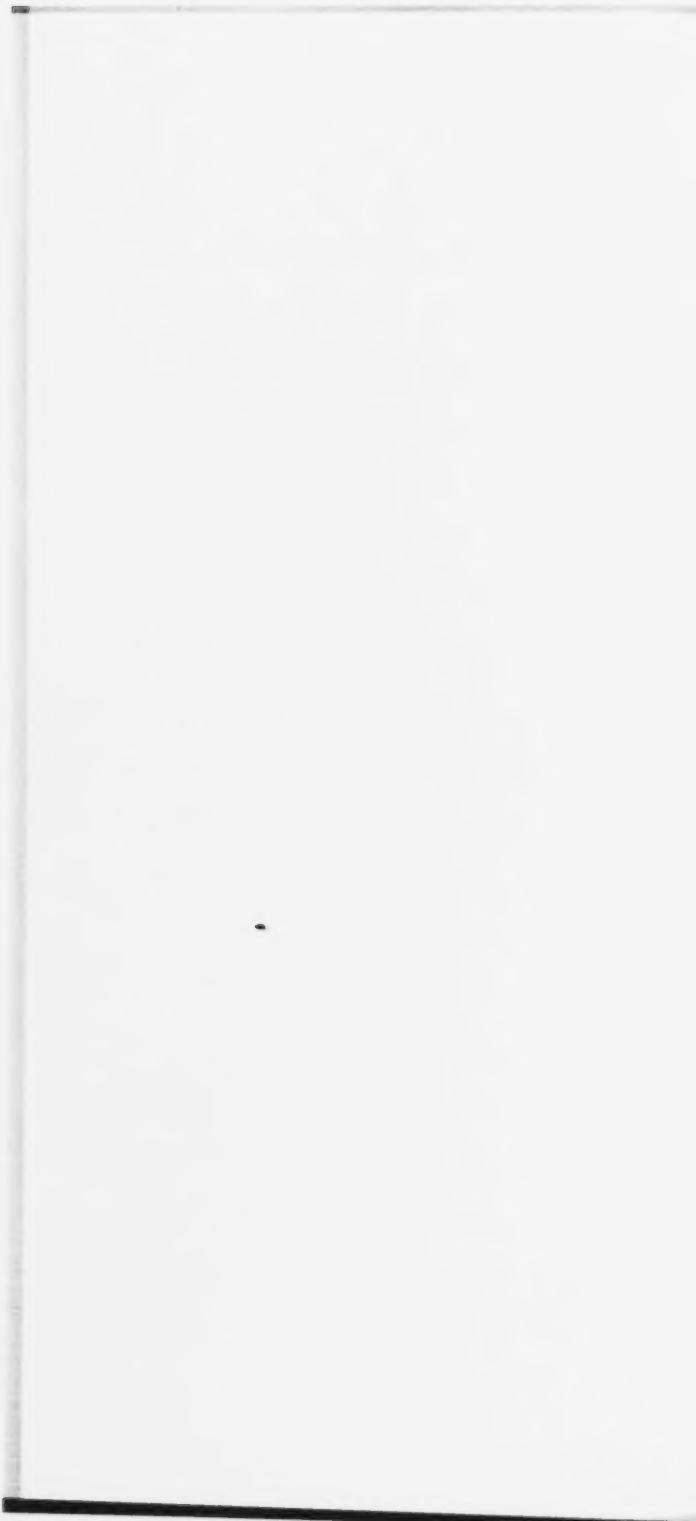
(2) granting such other, further and differ (p.2) ent relief as to this Court may seem just and proper.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

> The proposed temporary stay in the proposed order to show cause, and the terms and conditions of the grant of said temporary stay (i.e., the perfecting of the appeal by a day certain, and affirmant's temporary absence from the country).*

The proposed order to show cause submitted herewith contains a proposed temporary stay of the operation and effect of the order of disbarment, dated June 14, 1972 (Exhibit "A", attached hereto, at pp. infra), as amended by order of the Appellate Division, Second Department, so as to make the disbarment effective July 14,

*A stay and temporary restraining order were respectively denied by the Appellate Division below and a Justice thereof (see p. 48, infra).



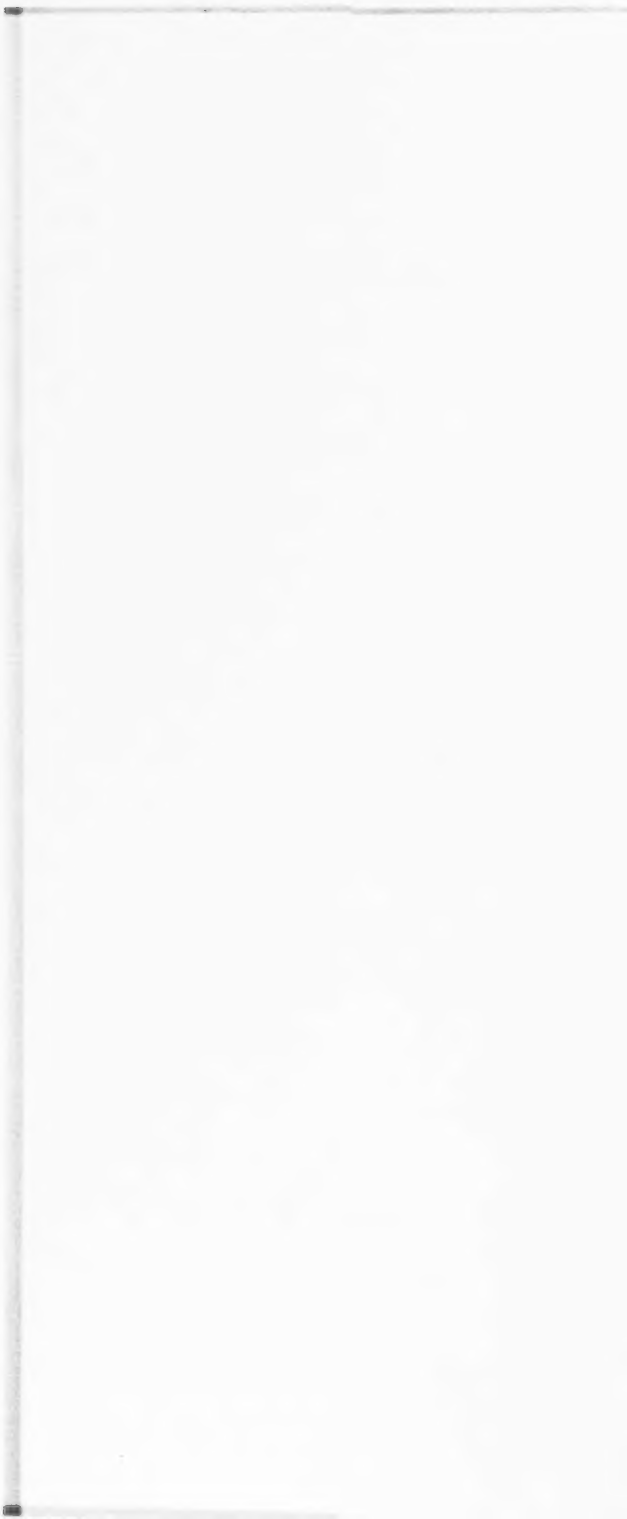
1972 (Exhibit "B", attached hereto at pp. infra), pending the determination of the within application, made pursuant to CPLR 5519(c), for a stay of the operation and effect of the order of disbarment pending the determination of the appeal heretofore taken by respondent-appellant herein on July 10, 1972, from the order of disbarment, pursuant to CPLR 5601 (b)(1), on constitutional questions. Cohen & Karger, Powers of the N.Y. Court of Appeals (rev. ed., 1952), sec. 183, p. 685.

On July 24, 1972 (New York Law Journal, July 24, 1972, p. 10, col. 7), the Appellate Division, Second Department denied the application of respondent-appellant, based upon the constitutional question involved on appeal - these questions are presented

below - for an order (a) vacating the order of disbarment (as so amended) on various grounds of invalidity, and, in the alternative, (p. 3) (b) staying, pursuant to CPLR 5519(c), the operation and effect of the order of disbarment ((as so amended) pending the determination of the appeal from said order to this Court.*

* As appears below, some of these constitutional questions were also raied by respondent-appellant at earlier stages of the proceedings below. Cohen & Karger, Powers of the N.Y. Court of Appeals, (rev. ed., 1952), sec.55(b), pp. 251-252:sec. 169, pp. 641-643. One of the questions created by the conflict between the order of disbarment and the decision upon which it purports to be based ("I", pp. 18 to 25; 5-18, infra) - could not have

(Footnote continued on next page)



A temporary restraining order was also denied by the Justice who signed the order to show cause dated July 11, 1972, returnable July 14, 1972.

Unless the temporary stay is granted, the motion for a stay and the appeal become academic, and any eventual reversal and vacatur of the order of disbarment would be in the nature of a

been raised at any of said earlier stages, since it was first introduced into the case by the Appellate Division's determination of the proceedings. Asserting the constitutional contentions, in any event, on the motion to set aside the order of disbarment, was, of course, timely. Cohehn & Karger, op. cit., sec. 169, p. 642, note 56, second sentence, and authorities there cited.

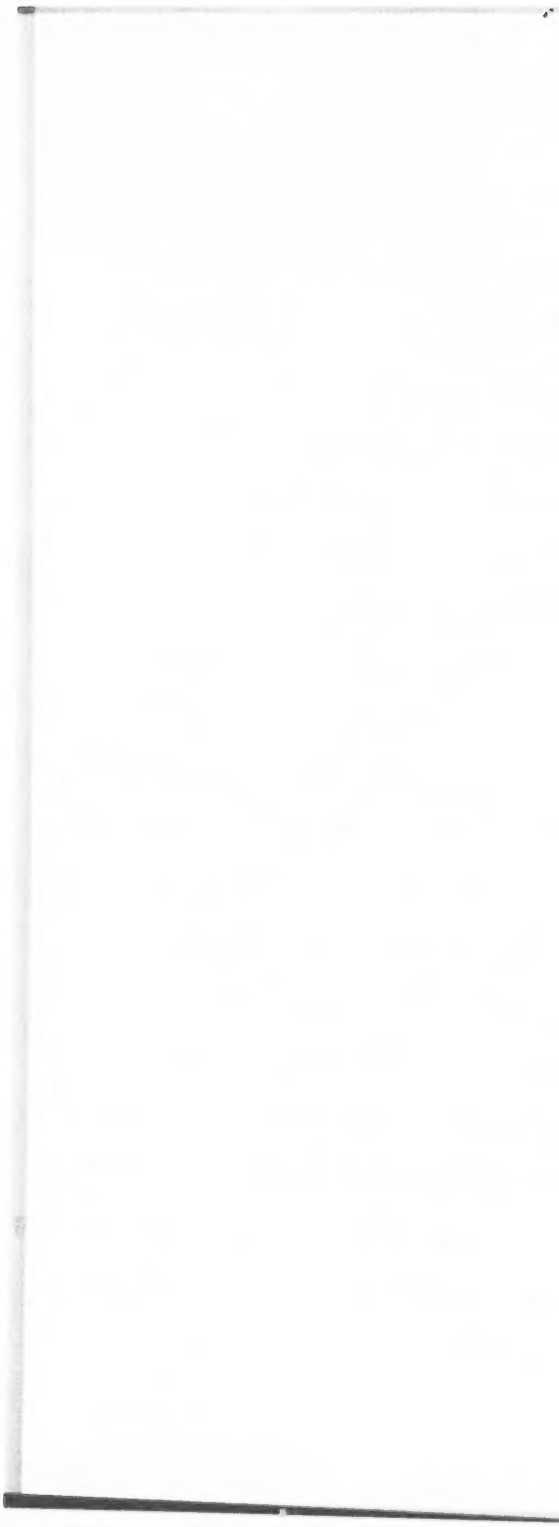
pyrrhic victory.

> The terms and conditions of the grant of the temporary stay (i.e., the perfecting of the appeal by a day certain, and affirmant's temporary absence from the country).

Your affirmant recognizes that the temporary stay sought herein would be conditioned upon the perfecting of the appeal by a day certain. It is respectfully requested that that day certain be fixed as September 30, 1972, for the following reasons: Your affirmant is leaving the country today, July 31, 1972, for a long-delayed European vacation with his family, and will be away during (p. 4) the month of August, 1972. He will need, at the minimum, until September 30, 1972 to prepare the

record of appeal, or appendix, and the main brief, a task which, he estimates, will consume his entire time, on a seven-day a week basis (as well as evenings), from the time of his return to September 30, 1972* The issue is vital to respondent-appellant - he is, by the order of disbarment, prohibited from continuing a professional career begun in 1939 - and the time requested

*Your affirmant was retained on July 24, 1972, and must become thoroughly familiar with the facts of the case, which have not been presented in depth on this application. Moreover, the record is a tangled and complex one, with numerous - some forty - voluminous exhibits, some of them (e.g., abstracts of title) running to many pages, and filled with multitudinous details.



is essential in order to present the appeal with maximum effectiveness.

(p. 18).....

> THE ORDER OF DISBARMENT AND THE DECISION (AS CLARIFIED AND AMPLIFIED BY THE ACCOMPANYING OPINION, INCORPORATED IN THE DECISION BY REFERENCE THERETO, UPON WHICH THE ORDER OF DISBARMENT PURPORTS TO BE BASED, ARE EACH VOID FOR WANT OF DUE PROCESS, FOR SEPARATE BUT RELATED REASONS, SET FORTH BELOW.*

*This contention - based upon facts first introduced into the proceedings by the determination of the Appellate Division - was asserted at the Appellate Division by respondent-appellant on his motion to vacate the order of disbarment, etc., which was denied on July 24, 1972.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

A fuller statement of the necessarily abbreviated point heading above, without supporting authorities - which are set forth below - is as follows: The order of disbarment and the decision (as clarified and amplified by the accompanying opinion, incorporated in the decision by reference thereto) are each void for want of due process, for separate but related reasons, as follows:

(p. 19) The order of disbarment (a final order having the force and effect of a judgment) is void for want of due process, in that it renders nugatory the notice and opportunity to be heard afforded to respondent-appellant, because the order, in its essential dispositional, directory and decretal provisions, not only does not conform to the decision (as so clarified and

amplified), as it should, but goes materially beyond the decision, (as so clarified and amplified) in that while the decision (as so clarified and amplified) (a) disposes of only those portions of petitioner's and respondent-appellant's respective motion and cross-motion addressed to the Referee's report and findings as to five (5) of the seven (7) charges (see pp. 13 and 14 supra), (b) recites that said five (5) charges have been established, (c) directs respondent-appellant's disbarment because of his guilt of said five (5) charges, but (d) fails to mention or dispose of the remaining two (2) charges, the order of disbarment, however, (e) disposes of petitioner's motion and respondent-appellant's cross-motion addressed to the Referee's report and findings concerning all seven (7) charges, (f) recites that all said seven (7) charges have been

established, and (g) directs respondent-appellant's disbarment because of his g guilt of said seven (7) charges.

Continuing the fuller statement of the necessarily abbreviated point heading above, without supporting authorities - which we give below - it should be stated that the decision (as clarified and amplified by the opinion) is also void for want of due process - with the result that the order of disbarment, predicated upon the decision, is also void for want of due process - in (p.20) that the decision renders nugatory the notice and opportunity to be heard afforded to respondent-appellant, because the decision fails to decide all the essential and material issues which were heard and reported on by the Referee, and were the subject of petitioner's motion and respondent-appellant's cross-motion addressed to the Referee's report

and findings: that is, the decision fails to decide the question of respondent-appellant's guilt or innocence of two (2) of the seven (7) charges, the disposition of which two (2) charges would necessarily affect the disposition or re-disposition of the other charges, since each of these still undisposed of two (2) charges was made by a complainant who made one or more of the other charges, each of the charges turned on the issue of credibility, and the issue of respondent-appellant's credibility, is common to all the charges.

The law argument proper

The order of disbarment herein, while denominated a "final order" determining the special proceedings herein (Judiciary Law, sec. 90, subd. 8; CPLR 103, subd. "b"), actually possesses the character of a judgment determining an action. CPLR 103(b); cf. CPLR, Article

78, where the paper which determines a special proceeding brought under said Article, is termed a "judgment", APLR 7805.

It is axiomatic (this is introductory to the due process argument) that a final order or judgment must conform to the decision - or, in the case of a jury trial or a reference to hear and determine, the final order or judgment must conform to the verdict or report - upon the (p. 21) authority of which the final order or judgment is based, and that said final order or judgment may not, in its essential dispositional, directory or decretal provisions, go beyond the decision (or verdict or report, as the case may be). Brown v. McKie, 185 N.Y. 303, 305, Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester, 294 N.Y. 254, 259; Kenny v. Apgar, 93 N.Y. 539,

548; Dunn v. Niagara Plastic Mold, 33 Misc. 2nd 269, 271 (Sup. Ct., Erie County; Jasen, J.): Hyman v. Teachers Retirement Board, 19 Misc. 2d 374, 375 (Sup. Ct., N.Y. County, Saypol, J.): Brown v. Shyne, 123 Misc. 851, 852; (Sup. Ct., Onondaga County; Edgcomb, J.): Marc v. Pinkart, 133 Misc. 83, 85; (Municipal Court: City of New York; Sulzberger, J.)Troughton v. Dismore Holding Co., Inc., 105 Misc. 638, 647; (Sup. Ct., Bronx County, Giegerich, J.); Elliot v. Elliot, 97 N.J. Super. 10, 234 A. 2d 101, 102 (at "1"); (Sup. Ct., N.Y.); In re Ryan's Estate, 130 N.Y. Eq. 380, 22 A 2d 348, 349 (at "2, 3") (Prerogative Court of New Jersey): North v Atlas Brick Co., 13 S.W. 2d 59, 62 (at "6-8) (Commission of Appeals, Texas); CPLR 5016(c); 8 Carmody-Wait 2nd, Cyclopedia of N.Y. Practice, sec. 635, 49 C.J.S. "Judgments", sec. 55, p. 138).

EXCERPTS FORM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THERFROM TO SAID COURT (CONTINUED)

It is equally axiomatic - and here we come to the due process argument - that essential dispositional, directory or decretal provisions in a final order or judment - e.g., the relief granted - which neither correspond to nor are appropriate to that which has been heard and decided, must be stricked as being in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States (Standard Oil Company of Indiana v. State of Missouri, etc., 224 U.S. 270, (p.22) 281 cited, Shelly v. Kraemer, 334 U.S. 1, 16, note 15), as well as its counterpart in the Constitution of the State of New York (Article 1, sec. 6, concluding paragraph), both clauses having the same intendment (Central Savings Bank v. City of New York, 280 N.Y. 9, 10), since including in a final

order or judgment dispositional, directory and decretal provisions (e.g., the relief granted), which do not correspond to nor are appropriate to what has been heard and decided, renders nugatory both the notice and opportunity to be heard which together constitute due process. Standard Oil Company of Indiana v. State of Missouri, etc., 224 U.S., at p. 281, cited, Shelley v. Kraemer, supra, 334 U.S. 1. 16, note 15.

Since the order of disbarment herein not only fails to conform to the decision (as clarified and amplified by the opinion), but, in fact, goes materially beyond it, in that (a) the order disposes in full of petitioner's motion and respondent-appellant's cross-motion addressed to the Referee's report and findings as to the seven (7) charges in the case (whereas the

decision disposed of only five (5) charges, and neither mentioned nor disposed of the other two (2) charges, (b) the order recites that all seven (7) charges have been established (whereas the decision, as clarified and aplified by the opinion, finds five (5) charges to have been established), and (c) the order directs respondent-appellant's disbarment because of his guilt of said seven (7) charges (whereas the decision directs his disbarment because of his guilt of five (5) charges), it follows that the order of disbarment is void for want of due process in that it, in effect, emasculates the notion and opportunity to be (p. 23) heard given to respondent-appellant. Standard Oil Company of Indiana v. State of Missouri, supra, 224 U.S. 270, 281 cited, Shelley v. Kraemer, supra, 334 U.S. 1, 16, note 15.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

In the foregoing connection, it must be borne in mind, moreover, that the order may not be sustained, insofar as concerns the five (5) charges found by the decision to have been established, since, First, the proceeding must be sent back to the Appellate Division for disposition of the still undisposed of two (2) charges; secondly, the disposition of these two (2) charges would necessarily affect the disposition or re-disposition of the other charges, since each of the two (2) charges was made by a complainant who made one or more of the other charges, each of the charges turned on the issue of credibility, and the issue of respondent-appellant's credibility is common to all the charges; and third, since the basis of the order of disbarment - respondent-appelant's guilt of all seven (7) charges - is an

untenable one, having no foundation in the record, the proceeding must, in any event, be remitted to the Appellate Division (even if it was not being remitted to that Court for the purpose of disposing of the still undisposed of two (2) charges) for the purpose of determining the discipline to be imposed in connection with the five (5) charges found by the decision to have been established. Matter of Mix, 274 N.Y. 183; Matter of Kasha, 290 N.Y. 630, 631; Sacharoff v. Corsi, 295 N.Y. 927, 929.

It is also axiomatic - this is introductory to the due process argument concerning the decision - that a decision (as distinguished from a final order or judgment (p. 24) entered upon the authority of the decision) must dispose of all the essential issues which were litigated

and heard. Lowe v. Lowe, 265 N.Y. 19; Troughton v. Digmore Holding Co., supra, 105 Misc. 638, 647 (Sup. Ct., Bronx County, Giegerich, J.); Fuller v. Galeota, 268 A.D. 949, 950 (Fourth Dept.); Cendello v. Stock, 283 A.D. 400, 402 (Fourth Dept.); Stacey Hardware & Electric Supplies, Inc., 38 A.D. 2d 514 (First Dept.); Water Right & Electrical Co. v.Rockland Light and Power, 245 A.D. 739; Cooperstown Cattle Co. v. Smith, 275 A.D. 240, 243 (Second Dept.); 49 C.J.S. (Judgments) sec. 43, pp. 101-102; Cohen & Karger, Powers of the N.Y. Court of Appeals, (Rev. Ed. 1952) 571.

It is also settled - and this is also introductory to the due process argument - that a court, having ordered a reference, and received a report on the issues, may not disregard it, in

whole or in part, but must accept and/or reject its constituent parts. Breland v. Motor Vehicle Accident Indemnification Corporation, 24 A.D. 2nd 881 (Second Department).

It is also settled - and here we come to the due process argument - that the failure of a decision to dispose of all essential issues which were litigated and heard, emasculates and renders meaningless the notice and opportunity to be heard - which together constitute due process - which the adversely affected party received. Fayerweather v. Ritch, 195 U.S. 276, 297 (second par.; concluding sentence); see, for parity of reasoning, People v. Havnor, 149 N.Y. 195, 198-199; In re Kemmler, 136 U.S. 436, 448 (third par.); Hovey v. Elliot, 167 U.S. 409, 445; Standard Oil Company of Indiana v. State

of Missouri, supra. 224 U.S. 270, 281, cited, Shelly v. Kraemer, supra. 334 (p.25) U.S. 1, 16, note 15.

From all the foregoing it follows that the decision (as clarified and amplified by the opinion), since it fails to dispose of two (2) charges which were heard and reported on by the Referee, and were, along with the other five (5) charges, the subject of petitioner's motion and respondent-appellant's cross-motion, addressed to the Referee's report and findings, and the disposition of said two (2) charges would necessarily affect the disposition - or redisposition - of the other charges, since each of the two (2) charges was made by a complainant who made one or more of the charges, each of the charges involved the issue of credibility, and the issue of respondent-appellant's

credibility was common to all charges, and, moreover, the two charges aforesaid (along with four others, for a total of sic out of seven charges) were found by the Referee not to have been established, it follows that the decision, because of its failure to dispose of the two charges, was void for want of due process in that it rendered nugatory the notice and opportunity to be heard afforded to respondent-appellant.

Since the order of disbarment purports to be based upon the authority of the decision, it follows that the order of disbarment is also void for want of due process because of the decision's want of due process.

II

THE ORDER OF DISBARMENT MAY NOT STAND BECAUSE IT WAS MADE IN VIOLATION OF

RESPONDENT-APPELLANT'S FIFTH AMENDMENT RIGHTS AND PRIVILEGES (SPEVACK V. KLEIN, 385 U.S. 511, AND OTHER AUTHORITIES CITED BELOW).*

(p. 26) A further statement of the necessarily abbreviated point heading above - without supporting authorities, which are set forth below - is as follows: The order of disbarment - which directs respondent-appellant's disbarment because of his guilt of seven (7) charges - may not stand, since it was made in violation of respondent-appellant's

*This contention was asserted by respondent-appellant at the Appellate Division on the motion to vacate the order of disbarment denied on July 24, 1972. The Fifth Amendment issue was litigated at the hearings before the Referee (see also p. 3. footnote, supra).

Fifth Amendment rights and privileges (Spevack v. Klein, 385 U.S. 511, and other authorities cited below), in that with respect to four (4) of the charges (including, incidentally, the two still undisposed of charges), the facts of each of which could conceivably form the basis of criminal prosecution, and concerning which four charges petitioner produced no evidence, respondent-appellant, who had previously advised petitioner, in writing of his intention to invoke the Fifth Amendment as to all charges, was compelled to give evidence as to said charges by the combination of (a) the request made by petitioner-respondent's counsel, at the hearings before the Referee, that respondent-appellant take the stand and given evidence as to said four (and other) charges, and (b) the Referee's ruling,

made when respondent-appellant demurred, that if respondent-appellant failed to give the requested evidence, he, the Referee, would, with respect to said four (and other) charges, draw inferences unfavorable to respondent-appellant.

.....

(P. 30) Put differently, what the Referee was saying was that although respondent had the right to claim the privilege of the Fifth Amendment, nevertheless, with respect to said four charges - on which petitioner had offered no evidence, and which could form the basis of criminal proceedings- as well as other charges, he, the Referee, if respondent invoked the privilege, would conclude that respondent was guilty of said charges.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

What the Referee threatened to do, if respondent insisted on invoking the Fifth Amendment and remaining silent as to these four (and other) charges, was plainly unauthorized (Spevack v. Klein, 385 U.S. 511; Matter of Zuckerman, 23 A.D. 2nd 825, vacated and remanded sub. nom. Zuckerman v. Greason, 386 U.S. 15, mod. 27 A.D. 2nd 848, affd. 20 N.Y. 430), and constituted impermissible coercion, exerted, by judicial authority, upon respondent, in order to compel him to surrender his privilege and furnish the requested missing evidence. See Garrity v. New Jersey, 385 U.S. 493; Gardner v. Broderick, 392 U.S. 273; Uniformed Sanitation Men Ass'n. Inc. v. Commissioner of Sanitation of the City of New York. 392 U.S. 280; Matter of Zuckerman, supra.

The Referee's threatened action placed respondent in an unmistakable dilemma. If respondent insisted on claiming the privilege and declined to furnish the requested missing evidence, the Referee would conclude that he was guilty of the said four charges. If he supplied the evidence, the evidence might tend to incriminate him.

Respondent, through his counsel, requested an (p. 31) adjournment to consider the matter (96), and the Court granted it (104).

Before adjourning the hearings, however, the Referee permitted petitioner to call a witness on Charge I, the so-called Febos complaint (106-152), to which the Fifth Amendment claim does not, of course, attach.

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

At the conclusion of said witness' testimony, the Referee adjourned the hearings (152).

During the interval which elapsed before the hearings were resumed, respondent and his counsel discussed the question of what choice to make (277-273), decided that respondent would testify, under the constraint of the Referee's said ruling and threat, of course, and when the hearings resumed, respondent took the stand- under said constraint - and gave testimony as to, inter alia, the four charges concerning which petitioner had offered no evidence, and had called respondent to supply the evidence, and which could form the basis of criminal proceedings. Specifically, respondent testified concerning said four charges, as follows:

409 Bristol Street
(petition, p. 3,
pars. "H" - "L").

Respondent testified as to said charge at pp. 250-259 of the transcript.

684 President Street
(petition, p. 4,
pars. "M" - "O").

Respondent gave evidence as to said charge at pp. 259-260 of the transcript. (This charge is one of the two still undisposed of charges; see p. 14, supra).

(p.32) 472 Warren Street
(petition, p. 4,
pars. "A" - "D").

Respondent testified as to said charge at pp. 261-266 (first to tenth lines), and 267 (from seventh line to bottom) - 270 (first to seventh lines).

270 Propsect Park West
(petition, pp. 4-5,
pars. "E"- "H").

Respondent gave testimony as to said charge at pp. 266-267 (first to sixth lines), and at p. 270 (eighth

to thirteenth lines). During respondent's testimony, petitioner offered an abstract of title in evidence (petitioner's Exhibit 31 in evidence; 270). (This charge is another of the two still undisposed of charges).

From all the foregoing, it is clear that respondent was, in violation of his Fifth Amendment rights and privileges, compelled to give testimony as to four charges concerning which petitioner had offered no evidence (and, in fact, offered no evidence except through respondent); and each of which charges could form the basis of a criminal proceeding or proceedings.

Coercing or compelling respondent so to do violated his Fifth Amendment rights and privileges. Garrity v. New

Jersey, 385 U.S. 493, supra; Gardner v. Broderick, 392 U.S. 273, supra; Uniformed Sanitation Men's Ass'n. Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280, supra; Matter of Zuckerman, supra; all to be read with Spevack v. Klein, supra.

Inview of the foregoing, the four (4) charges to which the Fifth Amendment claim attaches, must be dismissed. Matter of Zuckerman, supra; and the other authori (p.33) ties cited directly above in the preceding paragraph.

That being so, the order of disbarment - predicated on respondent-appellant's guilt of seven (7) charges - must be reversed and vacated, and the proceedings remitted to the Appellate Division for determination of the discipline with respect to the three remaining charges. Matter of Mix, supra,

274 N.Y. 183; Matter of Kasha, supra,

290 N.Y. 630; Sacharoff v. Corsi, supra,

296 N.Y. 927, 929.

III

ALL THE PROCEEDINGS IN THE APPELLATE DIVISION SHOULD BE VACATED FOR WANT OF JURISDICTION AND DUE PROCESS, AND VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF NEW YORK, BECAUSE OF PETITIONER'S FAILURE, AS SHOWN BY ITS OWN RECORDS, TO FULFILL CERTAIN CONDITIONS PREREQUISITE TO THE FILING OF A PETITION WITH THIS COURT - NAMELY, CONDUCTING, IN ACCORDANCE

WITH THE LONG-SETTLED PRACTICE IN THE SECOND DEPARTMENT, AND PETITIONER'S BY-LAWS, AS WELL AS THE DUE PROCESS AND EQUAL PROTECTION CLAUSES ATTACHING TO SAID SETTLED PRACTICE, A HEARING OR HEARINGS ON THE CHARGES INVOLVED HEREIN, WHICH HEARINGS ARE "JUDICIAL PROCEEDINGS", TO WHICH THE POWER OF SUBPOENA AND THE TAKING AND TRANSCRIBING OF SWORN TESTIMONY ATTACH, AND IN THE CONDUCT OF WHICH PETITIONER'S COMMITTEE ON GRIEVANCES ACTS AS A QUASI-JUCICIAL BODY, AS AN ARM OF THE APPELLATE DIVISION (WIENER V. WEINTRAUB, 22 N.Y. 2nd 330, 331-332.*

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

It has long been the settled practice - at least (p. 34) in the Second Department, as well as the First - that complaints against attorneys (with the exception, of course, of attorneys who have been convicted of a felony; Judiciary Law, sec. 90(4)) - are, prior to the filing of a petition which may lead to an order of reference, subjected to a preliminary investigation by the grievance committee of a bar association, for the purpose of determining whether sufficient grounds exist for the submission of formal charges. Wiener v. Weintraub, 22 N.Y. 2nd 330, citing Matter of Wyte, 231 A.D. 539, 547; Asserted at the Appellate Division on the motion to vacate the order of disbarment (see p. 3, footnote, supra); also by respondent-appellant's motion refer the charges back to petitioner. (Exhibit "F" herein).

Sullivan v. Crisona, 54 Misc. 2nd 478, as to each of which, q.v.; see, also, Matter of Tuck, 180 A.D. 924, cited by the Appellate Division below in In Re Anonymous, A.D. 2nd 819 (March, 1964); Matter of Lesterwick v. Queens Bar Ass'n., 43 Misc. 2nd 996, 999; Matter of Zaslav, 21 A.D. 2nd 243, 245, citing Matter of Tuck, 180 A.D. 924, supra; Matter of Branch, 178 A.D. 585, supra and In re Anonymous, 13 N.Y. 2nd 654, q.v.; Carmody-Wait 2nd (Cyclopedia of N.Y. practice) sec. 3:212, pp. 562-563.*

The advantages and benefits to an attorney resulting from such preliminary hearings are described below, at pp. 38-39, infra.

* While the text states "occasionally a proceeding may be entertained without such a preliminary investigation" (p. 563), the case cited in the footnote, Matter of Fischer 231 A.D. 193, was one in which

(Footnote continued on next page)

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

The proceedings before the bar association's grievance committee constitute a "judicial proceeding", to which - since it is a judicial proceeding - the power of subpoena and the power to take and transcribe sworn testimony attach. Wiener v. Weintraub, 22 N.Y. 2nd 330, 331,

(p. 37).....

Before noting the fact that petitioner, in its petition below, expressly acknowledged the necessity, among other things, of holding hearings on complaints, in accordance with its by-laws - hearings which, we shall demonstrate below, and by petitioner's

the bar association had declined to investigate the matter on the ground that the complaint did not come within its jurisdiction.

own records, were never held (all that was held was a meeting or meetings to which respondent was summoned, as the only witness) - it (p. 38) should be pointed out that while nothing in the constitution of the United States or the State of New York, admittedly, requires that attorneys against whom complaints are made, be accorded preliminary investigation of same, including hearings by the bar association, nevertheless once a court - like the Appellate Division below - has imposed this requirement, and the practice of, among other things, of holding such hearings has been established as a routine measure, as it has (pp. 33-37, supra) then the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of New York attach, and

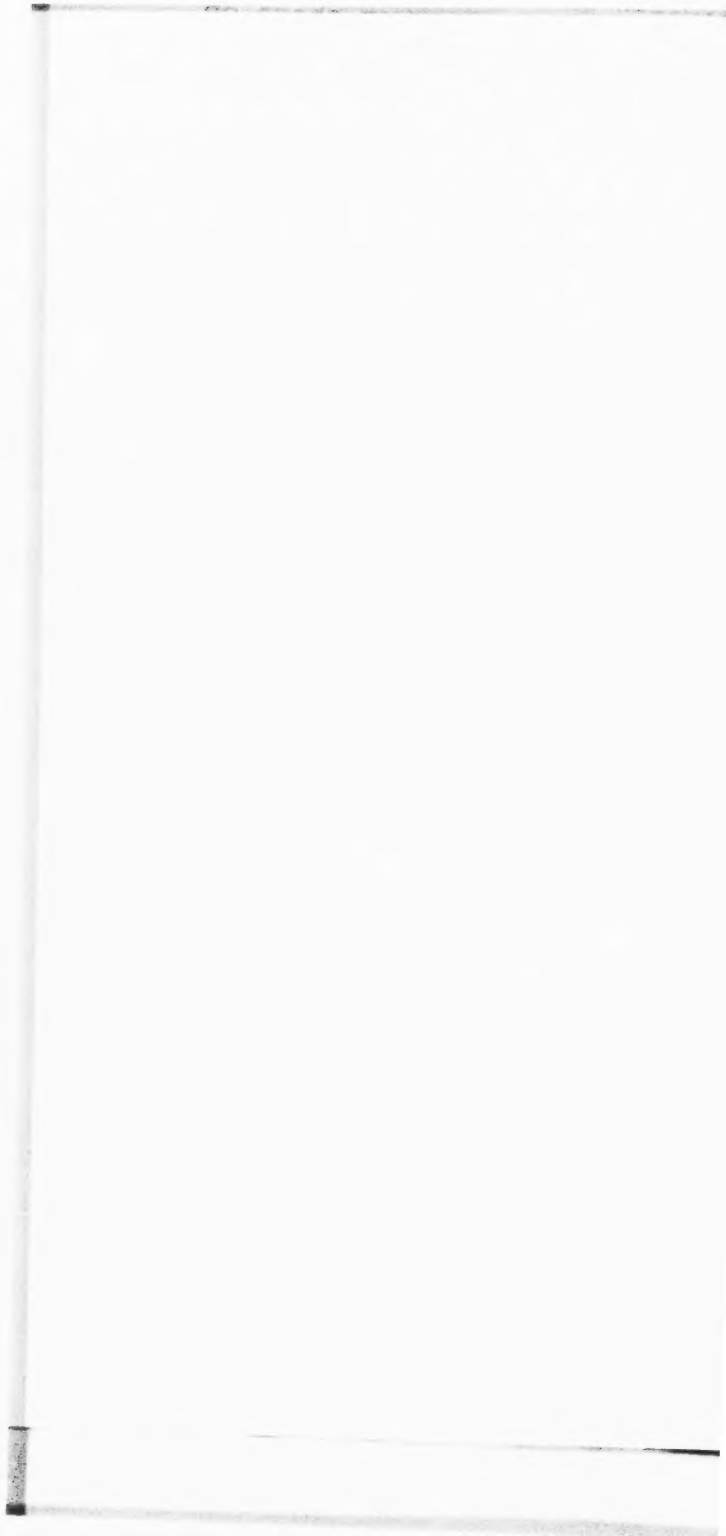
each attorney is entitled to such hearings, for otherwise the failure to hold such hearings would represent a denial of the equal protection clauses referred to. Griffin v. Illinois, 351 U.S. 12, 18; William v. Oklahoma City, 359 U.S. 458, 459-460, both to be read with Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239.

Moreover, it would appear that the failure to hold such hearings - hearings which have been an integral part of a long-settled practice and procedure - would also represent a denial of due process (the due process clause of the Fourteenth Amendment, and of the Constitution of the State of New York), as well. Boddie v. Connecticut, 401 U.S. 371, 374-375, 384; People v. Zambounis, 251 N.Y. 94, 97.

The denial of equal protection and due process represented by the failure to hold such a preliminary hearing or hearings is one that results in serious prejudice to an attorney, when it is noted that examination and cross-examination of witnesses at such a hearing may expose fatal weaknesses in the complainant's or Committee's case (p.39) which may lead the Committee to decide not to recommend further prosecution; that interrogation of such witnesses at such a hearing may fashion a vital impeachment tool for use in cross-examination of such witnesses at subsequent hearings before the Referee, or preserve testimony favorable to the respondent of a witness who does not appear at the hearings before the Referee; and, finally,the preliminary hearings may afford an opportunity to the attorney to discover the case which

the Committee has, and make possible the preparation of aproper defense to meet that case at the hearings before the Referee. See, for parity of reasoning, Coleman v. Alabama, 399 U.S. 1,9, where, notwithstanding the indictment and conviction of a defendant, the Supreme Court held that the latter had been deprived of valuable rights by the fact that at his preliminary hearing, which the State was not required to afford him (399 U.S., at p. 8), he had not had counsel. See, also, for parity of reasoning, Ross v. Sirica, 380 F. 2nd 557 (D.C. Cir., 1967), the latter two cases involving the failure to hold preliminary hearings.

Petitioner, in its petition below, expressly acknowledged the requirement that before presenting such a petition,



its Committee onGrievances must hold hearings on the complaints, and give notice of same to the attorney - although, as we shall demonstrate beyond any possible doubt, and by petitioner's own records, and notwithstanding the allegations in the petition to the contrary - no such hearings, preceded by the required service of formal charges, and at which hearings witnesses (e.g., the complainants or any of them) were called, were ever held, but

(p44) The proceedings in the Appellate Division were void for want of jurisdiction and due process, resulting from the fact that the proceedings before petitioner, subsequent to the filing of the various complaints and respondent's answers thereto, but prior to the filing of the petition, were void because of violation of Section 14 of the Judiciary Law - violation of which renders

the proceeding void, notwithstanding consent or waiver - in that after the settlement of the monetary claims of one of the complainants against respondent, to be paid in instalments, the Chairman of petitioner's Grievance Committee, as each instalment became due and remained unpaid, acted, in effect, as t the complainant's attorney, by personally and repeatedly telephoning, and having his secretary telephone, respondent for each instalment, and thus obtaining collection of the sum agreed upon, with the result that said Chairman - who, thereafter along with each of the other members of the Committee, was a quasi-judicial

officer, and, in such capacity, voted to prosecute respondent further and participated in the Committee's report and recommendation to the Board of Trustees to said effect - was disqualified (along with the other members of the Committee, with whome he consulted and deliberated), because of Section 14 of the Judiciary Law (prohibiting one who has acted as an attorney or counsel for a party from juding in a case involving said party) and the due process clause, from voting, reporting and making a recommendation in reference to the complaints against respondent, notwithstanding any consent by respondent to have said Chairman so collect the sums*

*These contentions were asserted at the

(Footnote continues on next page)

EXCERPTS FROM STATEMENT OF ALEX A. BOHM, ATTORNEY FOR MADERA, IN SUPPORT OF APPLICATION IN COURT OF APPEALS OF STATE OF NEW YORK FOR STAY OF ORDER OF DISBARMENT PENDING DETERMINATION OF APPEAL THEREFROM TO SAID COURT (CONTINUED)

.....

(p. 46) Section 14 of the Judiciary Law prescribed and prescribes that "A judge"- a term which embraces quasi-judicial officers (Wilcox v. Supreme Council of Royal Arcanum, 210 N.Y. 370; People v. McDonough, 8 A.D. 581) - "shall not sit as such in, or take part in the decision of, an action, claim, matter, motion or proceeding...in which he has been attorney or counsel...."for a party.

The purpose behind the statute is to furnish every litigant not only with an Appellate Division by respondent-appellant on his motion to vacate the order of disbarment. The contentions should also be read in the light of respondent-appellant's right to a preliminary investigation, as shown in "III" (pp. 33-43, supra).

impartial judge (or quasi-judicial officer),but one who has not, by any act of his, justified a doubt of his impartiality. Moers v. Gilbert, 175 Misc. 733, affd. 261 A.D. 957, appeal den. 261 A.D. 1074.

Manifestly, Mr. Connolly - a quasi-judicial officer - in personally enforcing collection of the sum agreed upon, by personally and repeatedly telephoning, and having his secretary telephone, respondent for each overdue instalment, and obtaining same, acted as the complainant's attorney would have acted. In doing so, he was no longer acting as an impartial quasi-judicial officer, but as a partisan - as, in effect, the complainant's attorney.

Certainly, Mr. Connolly, because of his series of telephone calls, must have formed certain impressions con-

cerning respondent's character - whether these impressions were warranted or not - and just as certainly these impressions influenced him when it came time for him to vote and join in a report and recommendation to the Board of Trustees as to whether to prosecute respondent further. But (p. 47) this is precisely what the prohibition concerning a judge who has acted as attorney or counsel for a party, is directed at - namely preventing a judge being influenced by a possible bias or prejudice and disqualifying one in such a position. Truesdell v. Winne, 44 Misc. 451.

So important is the policy behind the statute that the violation thereof not only disqualifies the judge, but all proceedings in which he participates are utterly void for want of jurisdiction (Oakley v. Aspinwall, 3 N.Y.

547), and any consent that he participate is of no effect. Queens-Nassau Mortgage Co. v. Graham, 157 A.D. 489; see, also, Oakley v. Aspinwall, supra.

The disqualification would obviously, in the nature of things, e-tend also to the judge's participation in other matters involving the same adverse party, being considered together - as the other six (6) charges had here - with the matter in which the judge has acted as attorney or counsel for a party, or, in effect, as attorney or counsel.

Moreover, an impartial judge is required by the due process clause. Johnson v. Mississippi, 403 U.S. 212, 216.

For the foregoing reasons, it is respectfully submitted, the proceedings before the Grievance Committee, subsequent to the filing of the complaints

and respondent's answers thereto, but before the filing of the petition, were and are void for want of jurisdiction and due process, with the result that the proceedings in the Court below, based, as they were, upon said first-mentioned proceedings, were and are also void.

DECISION-ORDER-JUDGMENT OF COURT OF APPEALS OF THE STATE OF NEW YORK

(A) DENYING MADERA'S MOTION FOR A STAY OF ORDER OF DISBARMENT, PENDING DETERMINATION OF APPEAL THEREFROM, AND

(B) ON THE COURT"S OWN MOTION, DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL CONSTITUTIONAL QUESTION

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of December A. D. 1972.

PRESENT,

Hon. Stanley H. Fuld,
Chief Judge, presiding.

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2 Mo. No. 603

In the Matter of
Frank R. Madera, An Attorney,
Brooklyn Bar Association,

Respondent,

vs.

Frank R. Madera,

Appellant.

DECISION-ORDER-JUDGMENT

A motion for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed, without costs, pon the ground that no substantial constitutional question is directly involved.

A copy

Gearon Kimball
Deputy Clerk

EXCERPTS FROM TESTIMONY AT HEARINGS BEFORE REFEREE, GIVEN BY EDWARD J. CONNOLLY, CHAIRMAN OF BAR ASSOCIATION'S GRIEVANCE COMMITTEE

(p. 17) E D W A R D J. C O N N O L L Y,

127 Maple Street, Brooklyn, New York, called as a witness in behalf of the Petitioner, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Connolly, are the you the chairman of the petitioner's Grievance Committee?

A Yes, I am.

Q And in such connection did you have occasion to investigate a complaint made by an Albert B. Gins on behalf of one Angelo Cortese

against this respondent Frank Madera?

A Yes, I did.

Q And can you tell us what you did in connection with such investigation?

A Yes. We had a hearing* in this matter on May 7th of 1970 and Mr. Madera came to the hearing* and so did Mr. Gins who was the nominal complainant and his client Mr. Cortese.

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* This was merely a conference among Mr. Connolly, Mr. Gins and Mr. Madera. The first meeting of the Grievance Committee -- itself not even a hearing -- did not take place until December 10, 1970 (A , supra).

EXCERPTS FROM TESTIMONY AT HEARINGS BEFORE REFEREE, GIVEN BY EDWARD J. CONNOLLY, CHAIRMAN OF BAR ASSOCIATION'S GRIEVANCE COMMITTEE

Q Will you tell us what happened.

. . . . . .

(p. 25)

Q Finally you arrived at a figure where you say it was agreed by Mr. Madera and Mr. Cortese that Mr. Madera owed $9,000?

A Yes. Some sum slightly above that.

Q Did you personally undertake to have that $9,000 paid by Mr. Madera, supervise its payments?

A Yes, I did.

Q In connection with that, will you tell us what you had to do to see that, to supervise this payment?

MR. SLAVIN: Objection, Your Honor. The payment was made, and within the timetable that Mr. Connolly testified was to have been done.

THE COURT: Any question about that, Mr. Kaplan?

MR. KAPLAN: There is no question it was paid, but I am entitled to show how it was paid.

MR. SLAVIN: Mr. Connolly testified that it was paid by the end of September of a

certain year, and (p. 26) I think he testified previously that it was within the timetable.

THE COURT: Mr. Connolly, you said you had worked out a timetable of dates and amounts?

THE WITNESS: Yes, sir.

THE COURT: Did the respondent commit himself to make those payments on those dates?

THE WITNESS: Yes, he did.

THE COURT: Did he?

THE WITNESS: Not on the dates, no. In the final amount, yes.

THE COURT: But he did not pay them in accordance with the schedule that had been set up?

THE WITNESS: No.

THE COURT: How much delay was there?

THE WITNESS: Well, Your Honor, there was a number of payments and each one was made after I made follow-up telephone calls to Mr. Madera to see that they did come in.

THE COURT: In other words, you were informed that the payment had not been made, you then called Mr. Mader and then the payment was made?

THE WITNESS: I was not informed of it, but I knew of it because the payments were made (p. 27) through me. All of the payments were delivered

to my office. They were all by check, money order to the order of Mr. Gins, but they were delivered to me and I forwarded them to Mr. Gins.

THE COURT: So that when you did not receive the payment on the scheduled date you called Mr. Madera?

THE WITNESS: Right.

THE COURT: And thereafter he made the payment?

THE WITNESS: Yes.

THE COURT: Just a telephone call in each instance?

THE WITNESS: No, In some cases a good many. It was very hard to reach Mr. Madera at times.

EXCERPTS FROM TESTIMONY AT HEARINGS BEFORE REFEREE, GIVEN BY EDWARD J. CONNOLLY, CHAIRMAN OF BAR ASSOCIATION'S GRIEVANCE COMMITTEE

Q How many of these payments did you have to call him about, Mr. Connolly?

THE COURT: He said every one

A Not the first one

A Not the first.

A The first one was all right, I am sure of that, because Mr. Madera brought it up himself, $1,000.

(p. 28)

A I wouldn't like to commit myself to every one but I would say in the great majority.

Q And you personally called him, did you, with respect to these payments, Mr. Connolly?

A Yes. I made most of the calls. Sometimes my secretary would make it in an attempt to see if his phone answered and would report back to me there was no answer.

MR. KAPLAN: You may inquire.

CROSS EXAMINATION

BY MR. SLAVIN:

Q On each and every occasion the minute Mr. Madera was reminded that a payment was due it was forthcoming promptly?

A Not promptly. I wouldn't say promptly, but it was forthcoming.

Q But isn't it a fact, sir, that the total payment was made within

the initial schedule that you had agreed upon with Mr. Madera?

A I would say substantially within it. I could give you the exact date of the last payment, but I remember it was so materially close to it that it wasn't important. The last payment that I got was on September 10th and (p. 29) I think my original plan had called for September 4th or something. Just a moment, I can tell you exactly. No, it is the second week in September which would be, well, say reasonably close. That must be in the second week.

Q That is correct, sir.

A Yes.

. . . . . .

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

(p. 95) THE COURT:* All right, that's all. Thank you. Who is next?

MR. KAPLAN:** I call the respondent,*** Mr. Modera.

THE COURT: You are not going to have the other witnesses?

MR. KAPLAN: Judge, I don't want to make any statements on the record that are going to either make me a witness in this proceeding or convey the wrong impression to your Honor. I have other witnesses.

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* The Referee.

** The attorney for the Bar Association.

*** Mr. Madera.

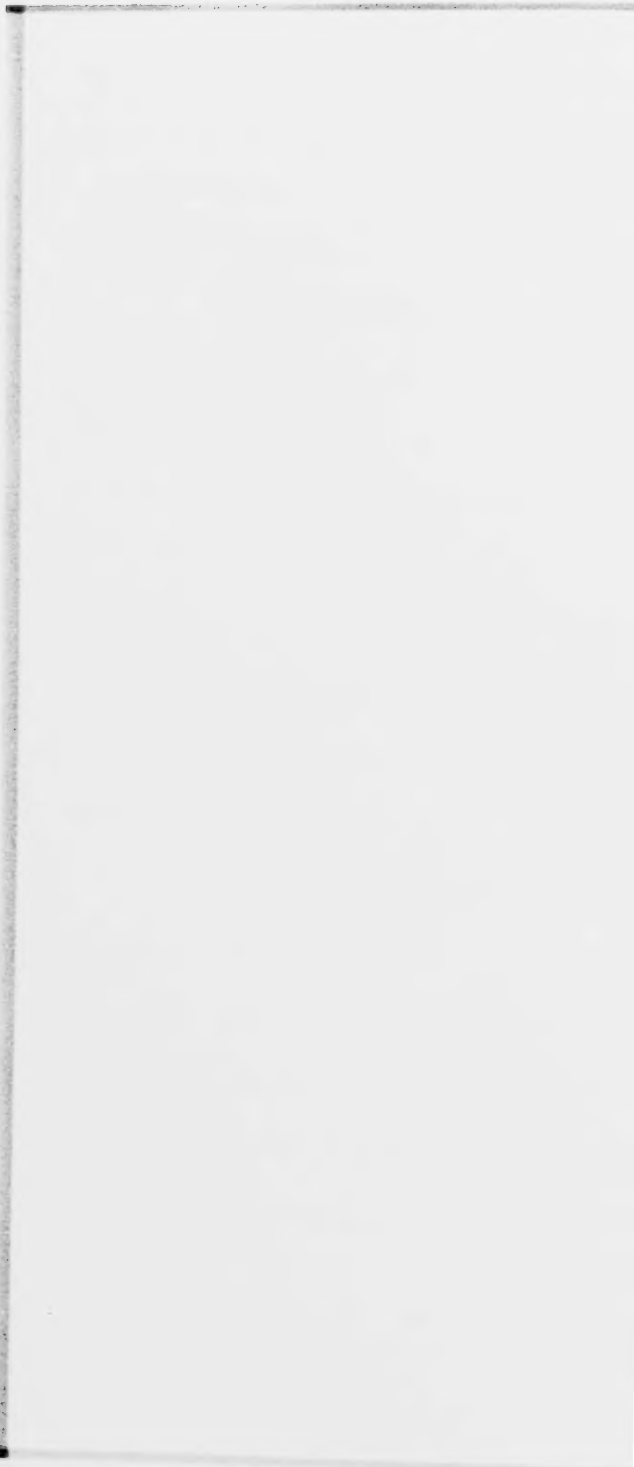
EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

THE COURT: If you are going to call the respondent, you have every right to do that, but it seems to me that it would be better to do that after you call the other witnesses.

(p. 96) MR. KAPLAN: Your Honor, there is a reason why I want to call the respondent. I don't know whether your Honor wants me to give you the reason.

MR. SLAVIN:* Your Honor, if he is going to call the respondent, I would want an adjournment and recess to do a little research, which I haven't done because I

* The attorney for Mr. Madera.



wasn't anticipating the respondent being called by the petitioner* as to whether or not I am going to let him answer any questions.

THE COURT: Well, of course, you know the rule on that.

MR. SLAVIN: To be very frank, your Honor, I am not sure what the precise law is on it.

THE COURT: He has an absolute right to claim the privilege, but he does not have the right to have any favorable inferences drawn from it.

MR. SLAVIN: I understand that, and that's the reason why I

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* The Bar Association.

want to do a little research to make up my mind whether I am going to run the risk.

THE COURT: In other words, he cannot be disbarred or otherwise disciplined for claiming the Fifth Amendment, but he will suffer the other (p. 97) consequences of the assertion of the privileges.

MR. SLAVIN: I understand, and because of that, sir, I would like to go through and read the cases and see what the courts have done so far as I can find them in the past on this sort of situation.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

THE COURT: What they have done very simply is this. In the first case they held that it was proper to disbar an attorney on the ground that his claim of the privilege in and of itself was evidence of unfitness.* In the other case they held that disbarment predicated solely upon the claim of privilege is not justified.**

MR. SLAVIN: You are talking, I presume, of the

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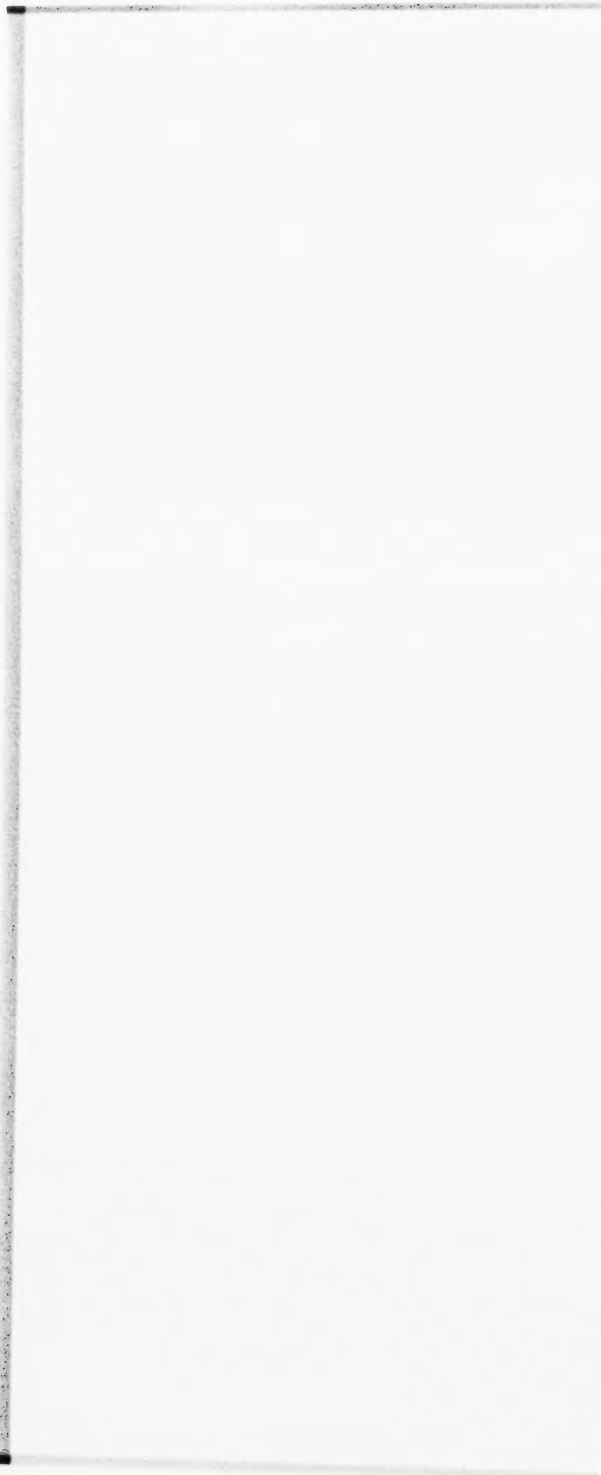
* The Referee was referring to Cohen v. Hurley, U.S.

** Here the Referee was referring to Spevack v. Klein, U.S.



Albert Cohen case and the Spevack case?

THE COURT: Yes.

MR. SLAVIN: Those two cases I am familiar with. I have not done any research on the other problem of what happens when you do assert privilege. I don't know whether he will or not, Judge -- and what inferences the Court draws from that and what they do in connection therewith, and I say that I think it is unfair for the petitioner to ask the respondent to become a witness without my having an (p. 98) opportunity to discuss it with my client at great length, because it is his future which is involved, and I would

say I would think the better order is as you put it, Judge: finish with the other witnesses first.

. . . . . .

(p. 101) MR. KAPLAN: I intend to call him. If he is going to assert his privilege on the Fifth Amendment (p. 102) it's then going to become necessary for me to do something else to provide the gap in the testimony. I intend to call him as a witness in chief on behalf of the petitioner with respect to the Sobral and Pedredi complaints.

MR. SLAVIN: Now, I will say to the Court -- I presume it is now 4:30 -- that we adjourn for the evening so that I can in the privacy of my

office discuss this matter with my client and come to a conclusion so that when we resume, if Mr. Kaplan wants to call Mr. Modera, I will then be able to intelligently instruct him to either invoke his Constitutional privileges or to answer the questions fully, but I would not like to be placed in the position of making the decision off the top of my head.

THE COURT: I don't have any question about that. I am looking at the Sobral complaint, and I see that part of it Mr. Beinhart will cover --

MR. KAPLAN: Some of it would be effected by his testimony, yes.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

THE COURT: And we have had nothing at all on the other complaint, Pedredi?

(p. 103) MR. KAPLAN: That's right, your Honor.

THE COURT: Do you want to subpoena?

MR. KAPLAN: Well, Judge, I have to get the subpoenas issued by the Appellate Division.

THE COURT: I don't think so.

MR. KAPLAN: That's been the practice. I am told by my confreres at the association. They have a regular form. They feel the Sheriff reacts quicker under such directions. So that being the case, I will make

another attempt with Mr. Pedredi when I get back to the office.

THE COURT: You are not going to be able to cover all of Sobral with Beinhart?

MR. KAPLAN: No.

THE COURT: So you would have to serve him as well?

MR. KAPLAN: I would either have to get it from Sobral or the respondent. As far as the Pedredi case goes, if I don't get Pedredi here, I am going to get it from the respondent. Pedredi told me on the phone he is an old man, he doesn't feel well. I asked him when he excepted to feel better, and I have no reason to believe that he (p. 104) expects his

health to improve within the near future. I am due to go into Miliary Service on June 28th and I don't want to take Mr. Modera's case in my duffel bag.

THE COURT: You will recall, I made it clear to Mr. Tatarelli when he was representing the respondent that I want all the testimony completed by the end of next week.

MR. KAPLAN: That's right.

MR. SLAVIN: I am willing to abide.

THE COURT: The problem is that Mr. Kaplan is bothered by the absence of the witnesses.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

MR. SLAVIN: If the Court will give me until tomorrow to make my decision --

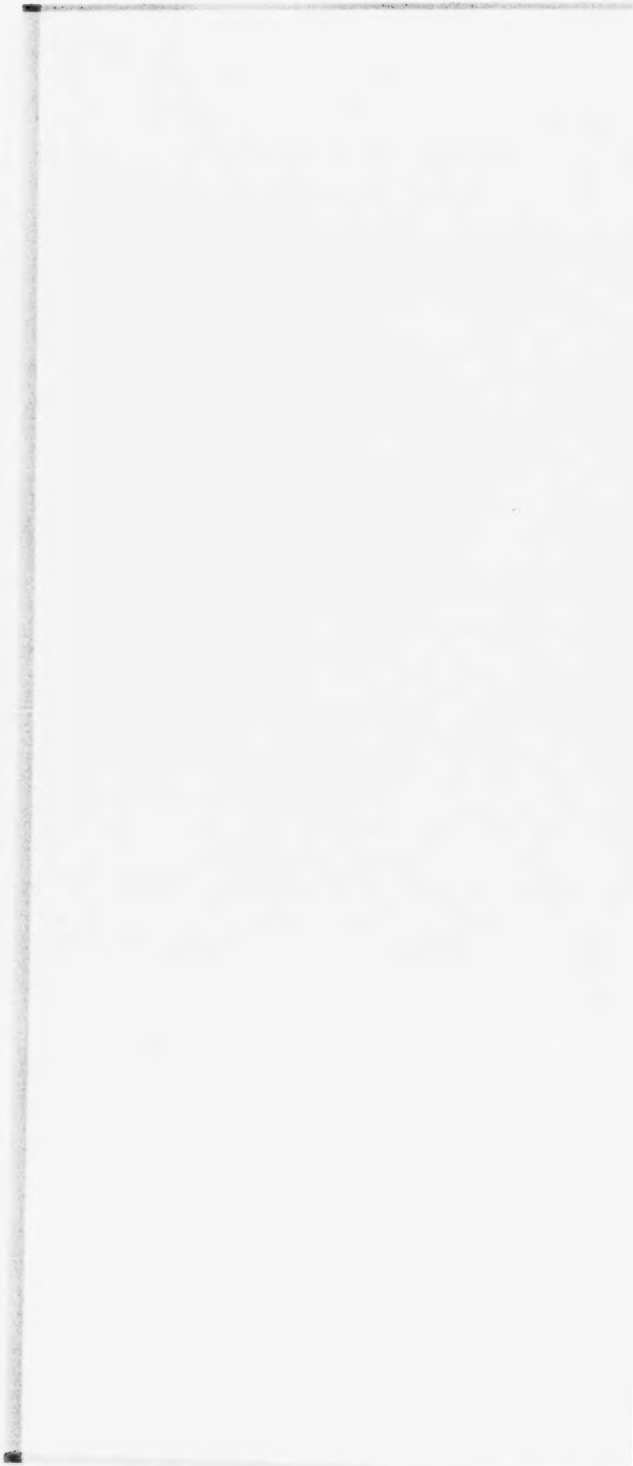
THE COURT: You have that anyway.

MR. SLAVIN: I don't know whether I am going to let Mr. Modera take the stand or not, but if I do, then the question of subpoenaing these people is obviated.

THE COURT: Well, I don't know that it is really. I am not so sure that no matter how willing Mr. Modera is to testify that that is an entirely sufficient substitute to the testimony of the (p. 105) complainants.

MR. SLAVIN: I understand.

THE COURT: For example, if Mr. Modera had been very willing to testify



on the Febos matter, his testimony could not have been as important to the proceeding as Febos' testimony, and it would not have been of the same effect either, because his letter shows that. So that if the witnesses can be brought in, it would be better to do it that way. If they can't, then of course Mr. Kaplan has no choice but to resort to secondary means of proving his case.

MR. KAPLAN: Are we going over then to 2:30 tomorrow.

THE COURT: Yes.

(Whereupon, the hearing was recessed until Thursday, June 10, 1971, at 10:00 o'clock a.m.)

. . . . . .

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

(p. 202) Brooklyn, N.Y., June 17, 1971.

THE COURT: Are you ready?

MR. KAPLAN: I am ready, your Honor. I call the respondent.

THE COURT: All right.

F R A N K R. M A D E R A , the respondent herein, residing at 12 Shorewood Drive, Port Washington, Long Island, State of New York, called as a witness by the petitioner, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Madera, are you the respondent in this proceeding?

A I am.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

Q Are you admitted to practice law in the State of New York?

A I was.

Q When were you so admitted?

A April, 1939, second department.

Q Do you maintain an office for the practice of law?

A Yes

Q Where do you maintain such office?

A 16 Court Street, Brooklyn, New York.

. . . . . .

(p. 250) respondent* - direct

. . . . . .

Q Now, in connection with this condemnation proceeding on 409 Bristol Street, did you give Mrs. Sobral

---

* Mr. Madera.

two checks or give her a check for $4,000?

A I gave her a post-dated check payable a long time after.

Q And was that check subsequently honored?

A It was finally paid. I don't owe her a dime any more.

Q At sometime in between the time it was finally paid, was the check returned for insufficient funds?

A Yes. Let me explain that. She promised -- Let me explain what happened.

Q Yes?

A We came back from the closing. We had the closing, and for the condemnation

award in the Municipal Building in Manhattan, and she had the check, and she left my office, and it was a terribly stormy day. She came back within five minutes. She said "My bank is in Manhattan; (251) (respondent - direct) I don't want to go to Manhattan to deposit these checks. You use them in your business, but you have to pay me the same interest that the bank pays me, and you should give me a check for next year."

My best recollection is it was for next year.

Q Well, I show you a photocopy of a check dated January 5, 1970, drawn on the Royal National Bank. That is your check; is it not?

A That's right. That was the post-dated check I gave her for the subsequent year.

Q This particular check was apparently returned for insufficient funds?

A That is right.

Q Is that correct?

A Yes.

MR. SLAVIN: All right. I am going to offer the check.

MR. SLAVIN: No objection.

THE COURT: When did you say that check was actually given to her?

THE WITNESS: The day of the condemnation. Maybe Mr. Kaplan would know the date.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

MR. KAPLAN: I don't know it, your Honor.

(p. 252) (respondent- direct)

THE COURT: Can you approximate it, how long before January 5, 1970, was it?

THE WITNESS: In October of the preceding year.

THE COURT: When did you make this check good, Mr. Madera?

THE WITNESS: During the early part of 1970, but not all at once.

BY MR. KAPLAN:

Q Did you make it good by cash or by check?

A By cash, by check, and one of Mr. Beinhart's $1500 checks I turned over to

her and she gave me a receipt for it.

Q She says that you gave her $3,000 in cash. Is that true?

A Very possible. It is very possible.

Q And how about the balance of this award of $6,197.56; did you ever pay that to her?

A I paid her everything. I don't owe her ten cents.

Q How did you pay the balance?

A She used --

THE COURT: Before we go any further on that, however, I just want to clarify something about this check; and I thought we ought to complete the (253) (respondent - direct) marking of it.

Let the photocopy of the check that we have been discussing here be marked Petitioner's Exhibit 25 in evidence. You have no objection, I take it?

MR. SLAVIN: No, your Honor.

(Same received in evidence and marked Petitioner's Exhibit 25.)

BY MR. KAPLAN:

Q Do you know how you paid off the balance of that condemnation award? Was it by cash or check?

A Combination of both.

Q On January 5, 1970, did you issue a check to her for $5,000, drawn on the Royal National Bank of New York

at 188 Montague Street?

A These were all postdated checks. I didn't issue it on that date; no.

Q All right. Is this the check that you issued to her a copy of the face of the check (indicating)?

A Yes.

Q And that check also was returned for insufficient funds?

A At that time, yes. She wasn't supposed to put it in.

(p. 254) (respondent - direct)

Q All right. What transaction was involved in this check?

A I think she was--it is all the same. These are duplications.

Q It is all related to Bristol Street?

A That's right, yes. She never had any other money.

MR. KAPLAN: I offer it.

MR. SLAVIN: No objection.

THE COURT: Just the face of the check?

MR. KAPLAN: Just the face; that is all I have, Judge.

BY THE COURT:

Q Will you tell me, please, Mr. Madera, why you gave Mrs. Sobral two checks dated the same day, January 5, 1970; one for $4,000, and one for $5,000, when the total amount of the condemnation was less than seven?

A Yes. I had originally in October given her one, I think, for four or five thousand dollars, and I then had stopped

my--I was no longer with that bank, and I told her, instead of holding that check, I was going to give her a different check, and I gave her something on account, and I gave her a check for the different, and I also paid her the interest that I promised her.

(p. 255) (respondent - by Court)

Q I don't follow your explanation at all.

There is marked in evidence as Petitioner's Exhibit 25 a photocopy of a check drawn on the Royal National Bank account, returned by the bank for insufficient funds, dated January 5, 1970, to the order of Mirtes Sobral, in the sum of $4,000.

A Right.

Q Now, we have another check drawn on the very same account, dated the same day, January 5, 1970, also returned for insufficient funds. This check is in the sum of $5,000. The check that has been marked Petitioner's Exhibit 25 in evidence is check number 131 on your account. That is the $4,000 check. This check appears to be number 132. Did you give her both those checks at the time?

A I must have. Yes, I must have.

Q Then I don't understand your explanation as to why you would have given her one check for $4,000 and one check for $5,000, when the total amount

of the condemnation award, I think you said was $6900.

MR. KAPLAN: $6197.56.

A. Oh, I owed her other money. She was lending me money and I owed her other money.

(p. 256) (respondent - by Court)

Q Well, then, you were intending by this to repay loans which altogether came to $9,000?

A That's correct, yes.

Q And you say that she wasn't supposed to deposit this check?

A That's right. I didn't intend to pay them at all--that wasn't the agreement at all.

Q But was there any agreement that she made with you when you gave

her this check number 132 on your account for $5,000 dated January 5, 1970?

A Of course, the agreement was that she was going to bring them back right after the first of the year, and I was going to give her some interest and tell her how much of this I could reduce. That was it. It wasn't supposed to pay her, and she wasn't supposed to put them in.

THE COURT: Do you want the check marked in evidence?

MR. KAPLAN: It is marked.

THE COURT: No; 131 is in.

MR. KAPLAN: I offer it.

THE COURT: Any objection, Mr. Slavin?

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

MR. SLAVIN: No, 132 can be offered also. The witness has explained it.

(p. 257) (respondent - by Court)

THE COURT: Petitioner's Exhibit 26 in evidence

(Same received in evidence and marked Petitioner's Exhibit 26.)

DIRECT EXAMINATION (RESUMED)

BY MR. KAPLAN:

Q Did you also have an account in the First National Bank of Glenhead, New York?

A I did.

Q And did you give Mrs. Sobral a check for $4500 drawn on that account?

A On what date?

A Dated January 20, 1970.

A Yes. At that time I told her I was going to reduce the loan and give her another postdated check, and she was never supposed to deposit them. She was supposed to bring them back and get new ones.

Q Well, I have the face of one dated January 20, 1970, which was returned uncollected funds. Is that the one you are talking about?

A Yes.

MR. KAPLAN: I offer it.

MR. SLAVIN: No objection.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

(p. 258) (respondent - direct)

BY THE COURT:

Q Mr. Madera, when did you give this check to Mrs. Sobral, the one for $4500, dated January 20?

A On or about January 10 or 11, and she was not--

Q And that was to pay in part the amount represented by the check, which has been marked Exhibit 26 in evidence; that is the $5,000 check?

A Yes, your Honor.

THE COURT: The difficulty with the photocopy, unfortunately, Mr. Kaplan, is it doesn't show the name of the payee, and the bank's return slip obscured the detail on

the check.

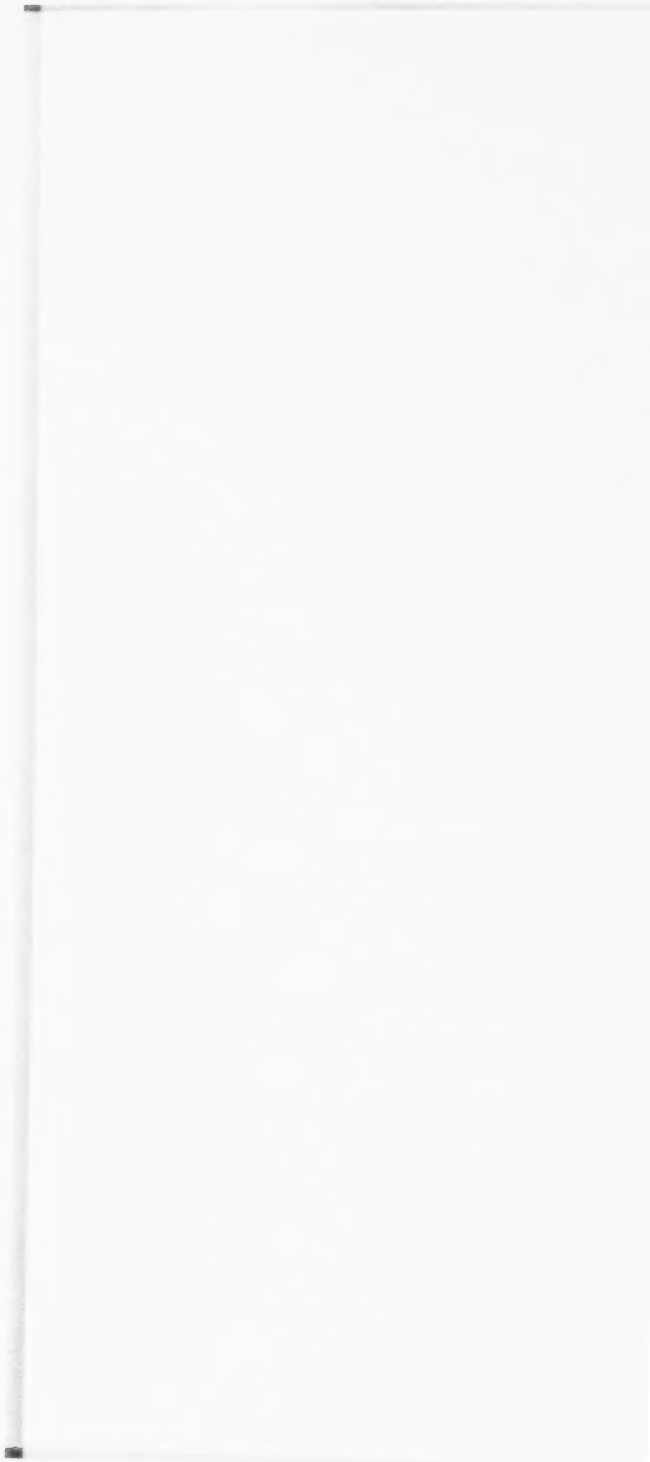
MR. KAPLAN: I have discussed this with the people at the petitioner, your Honor, and I am well aware of the validity of your Honor's comment.

Unfortunately, I had nothing to do with securing any of these papers.

THE COURT: Was she supposed to deposit this check?

THE WITNESS: No, sir. As a matter of fact, she told me that she hadn't.

THE COURT: All right; Petitioner's Exhibit 27 in evidence.



EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

(p. 259) (respondent - direct)

(Same received in evidence and marked Petitioner's Exhibit 27.)

BY MR. KAPLAN:

Q Mr. Madera, did you sell Mrs. Sobral premises 484 President Street?*

A Yes, I did.

Q And were those premises encumbered by a mortgage?

A Yes, sir.

Q Did you collect the payments on the mortgage?

A Part of them.

Q Did there come a time that the mortgage was defaulted and foreclosed upon?

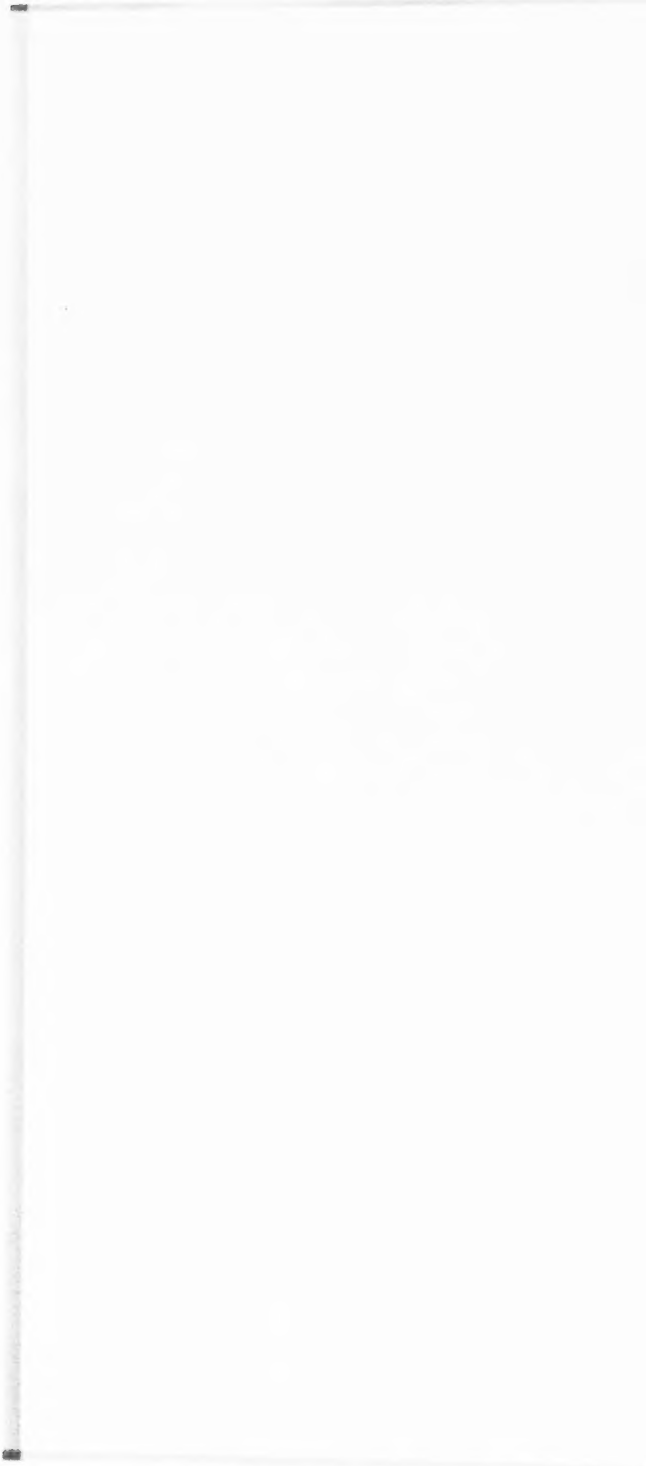
A. Yes

* The reference was to 684 President St. (a - supra).

A Yes

Q And was that during the time you were collecting payments?

A She was giving me $200 a month. We were always behind on the account. The actual mortgage payments amounted to about $240 a month, but she couldn't pay more than $200; and we fell behind, and the bank--and then I paid the bank and the bank returned the money. They said they wanted to proceed on the default. I explained to Mrs. Sobral there was nothing to worry about; that if it did go to (p. 260) (respondent - direct) foreclosure I would buy it in, and that's what I did.



EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

Q She was giving you money which you were to turn over to the mortgagee; is that correct?

A To the extent that it went; but it didn't go far enough. There wasn't enough money to pay the mortgage.

Q Now, Mr. Madera, since the inception of this proceeding, have you had occasion to talk to Mrs. Sobral?

A Oh, surely.

Q And have you now satisfied all of her complaints?

A Every one. I don't owe her a dime, and she is as happy as a lark.

Q Did you ask Mrs. Sobral to come to court with respect to this proceeding?

A I did not. I didn't ask her to come or not to come.

Q Did you discuss with her that these proceedings were pending?

A No.

Q Did she tell you that I had made some effort to obtain her presence here?

A No.

Q Did you know anything about it?

A No.

(p. 261) (respondent - direct)

Q But in any event, it is your testimony that at this time she has no reason to complain about you in any respect?

A Not for one penny.

Q And all these complaints that she has made in her letter and the complaints that are recited in the petition, you have satisfied?

A A hundred per cent.

Q Do you know a man by the name of Joseph Pedretti?

A I did.

MR. SLAVIN: Off the record, your Honor.

(Discussion off the record.)

Q Mr. Madera, did you receive from the Bar Association this complaint stamped July 27, 1970, by Mr. Pedretti, and did you in response to that write to the Bar Association on August 24,

1970 (handing)?

A I received the complaint, and I have answered by my letter of August 24, 1970. This is my signature on the letter.

MR. KAPLAN: If your Honor please, I offer the complaint, consisting of two pages, and the letter in response to the complaint, consisting of two pages. (p. 262) (respondent - direct)

MR. SLAVIN: All right, no objection.

THE COURT: All right, the complaint with the rider attached will be Petitioner's Exhibit 28-A and the two-page answer

by the respondent will be Petitioner's Exhibit 28-B.

(Same received in evidence and marked Petitioner's Exhibits 28-A and 28-B, respectively.)

xx

BY MR. KAPLAN:

Q With reference to 472 Warren Street, Mr. Madera, did you sell a mortgage to Mr. Pedretti for $8,000 on or about July 7, 1965?

A I did not. He loaned me, through my my company, $8,000, and he was going to get a $9500 mortgage on 472 Warren Street onthe resale.

Q Resale from whome to whom?

A We are operators. When we sell it to the user--

Q Your company was the Discount Realty Corporation

A That is right, yes.

Q On or about July 7, 1965, was Discount Realty Corporation in title to premises 472 Warren Street?

A Yes, it was.

MR. KAPLAN: I am going to offer, if your Honor (p.263)respondent - direct please, an abstract dated May 17, 1971, with reference to 472 Washington Street*, which recites that the title was searched from June 1, 1965, to May 17, 1971.

THE COURT: What is the address on Warren Street?

MR. KAPLAN: 472.

THE COURT: Any objection, Mr. Slavin?

MR. SLAVIN: No.

THE COURT: Petitioner's Exhibit 29 in evidence. (Same received in evidence and marked Petitioner's Exhibit 29.)

MR. KAPLAN: I would like to call to your Honor's attention that Petitioner's Exhibit 29 for the period involved does not indicate that the Discount Realty Corporation was in title to those premises.

MR. SLAVIN: I shall disagree with

*The reference was to 472 Warren Street.

with Mr. Kaplan as to what it shows. It shows. It shows that there is no recorded deed into Discount Realty Corporation.

MR. KAPLAN: All right. Now Mr. Slavin has produced a deed which apparently has not been recorded, because it doesn't bear any markings from the Register,which is dated July 7, 1965, from 128 (p. 264) respondent-direct Pennsylvania Avenue Realty Corp., which is recited in the last exhibit, to Discount Realty Corp.

Is that right, Mr. Slavin?

MR. SLAVIN: Yes, Mr. Kapln.

MR. KAPLAN: Is it true that this deed has never been recorded?

MR. SLAVIN: That is right. That was among the filed papers in Mr. Mader'as files pertaining to Mr. Pedretti, amongst other papers.

MR. KAPLAN: All right. I shall offer this.

THE COURT: One moment.

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

BY THE COURT:

Q Mr. Madera, who is Mr. Charles M. Ahrens?

A He is a Long Island Real Estate broker who used to act on my behalf. I am the one in control of 128 Pennsylvania Avenue Corporation. That is my corporation.

Q And the notary who took Mr. Ahrens' acknowledgement was Regina Klutz, your secretary?

A Yes.

THE COURT: That is Petitioner's Exhibit 30 in evidence.

xx (Same received in evidence and marked Petitioner's Exhibit 30.)

(P. 265 respondent-direct

BY MR. KAPLAN:

Q Now, the $8,000 that was involved in this transaction, Mr. Madera, did Pedretti ever collect it?

A Collected a substantial part of it. It is in accordance with--I have to explain the transaction between us.

Q Go. Ahead. Explain it.

A. I know Mr. Pedretti. He was one of my best acquaintaines; and I did business with him from about 1940, 1941, until I went overseas with the Army during the war.

When I came back I started to do business with him again. Now, the arrangement with him was that he was to give me the money. This was going on for over twenty years. He would give me the money, like, for instance, specifically in this particular case he gave me $8,000, and I would agree to give him $9500, in this particular case, and every month like he had about 25 of these transactions, every month I would mail him my check for all the 25 transactions, and I mailed him --I paid him like clockwork for nineteen years; until we got into trouble with vandalism on the buildings

and then I couldn't pay them all, but I have been paying him anyway, but I am not up to date. But he is satisfied. (p.266) respondent-direct

Q Well, did Discount Realty Corporation execute a mortgage or an assignment of mortgage on premises 472 Warren Street to Pedretti?

A We executed a mortgage, but no papers were ever recorded, and they were never delivered.

Q Discount Realty Corporation executed a mortgage to Pedretti on 472 Warren Street?

A Yes, but it was never delibered.

Q Who has it?

A Either I or he must have it.

Q Now, in connection with Pedretti, did you have something to do with on 270 Prospect Park West?

A Yes; the same type of transaction. He loaned me money, and he was supposed

to get the money back with a bonus plus six per cent.

Q Now, on or about Mary 20, 1969, did you execute arelease which recited that the mortgage had been assigned from one of your corporations to Pedretti?

A I don't remember.

Q Did you ever record an assignment of a mortgage?

A It might have been recorded. It could have been recorded.

Q How much money did you get on 270 Prospect Park West?

(p. 267) respondent- direct

A Whatever he says he gave me; that's what he gave me.

Q And you gave it back to him, or part of the money, in the same fashion as with Warren Street?

A Yes.

MR. KAPLAN: I am going to offer the abstract of 270 Prospect Park West, your Honor.

EXCERPT FROM TRANSCRIPT OF HEARING BEFORE REFEREE RELATING TO MADERA'S CONTENTIONS CONCERNING THE FIFTH AMENDMENT

THE COURT: Just a moment, please. Before you go ahead with that, if you will hold that for a moment, please, Mr. Kaplan, I would like to get some clarification on the situation as to 472 Warren.

BY THE COURT:

Q In the abstract which is in evidence as Petitioner's Exhibit 29, there is a record of a deed recorded on June 1, 1965, dated May 27, 1965, in which Nicholas Curtis, as committee, pursuant to an order of this court, is the grantor, and 128 Pennsylvania Avenue Realty Corporation is the grantee. It then appears that there was recorded on the same date, On June 1, and bearing the same date as the deed, May 27,1965, what is described as a purchase-money first mortgage with the mortgagor 128 Pennsylvania Avenue Realty Corporation, and the mortgagee is Lydia DeLucia, who does not appear to have been a grantor.

(p. 268) respondent- direct

Then there appears to be a purchase-money second mortgage, which is dated June 28, 1965, one month after the date of the deed, and recorded on July 15, 1965, in which 128 Pennsylvania Avenue Realty Corp. is the mortgagor, and Estelle Rose is the mortgagee.

Mr. Madera, will you explain how that came about?

A Yes. On the same day that we bought 472 Warren Street, we bought sic pieces of property from Curtis, and DeLucia is the name of the lady who put up all the front money. She put up the entire purchase price, and we had an arrangement with her. I think she put up altogether around $30,000, maybe thirty-two.

The arrangement we worked out with her is that she was going to put a large first mortgage on each parcel and the first 30 or 32 thousand ddllars that

came in from the sale of six parcels, she was going to be out, and she would give us the satisfaction of the mortgage, and then the people who were going to hold it on a permanent basis were going to take over, and that was the arrangement that I had with Mr. Pedretti.

Q In other words, Lydia DeLucia was, although this recites that it was a purchase-money mortgage, it

(p. 269) respondent-direct

was not apurchase-money mortgage; it was a mortgage to secure a loan?

A She paid everything. She paid for all six houses.

MR. SLAVIN: Actually, Judge, that could be a purchase-money mortgage; someone who lends the money to the purchaser, who takes back the mortgage, even though they are not going into title, could be considered a purchase money mortgage, I think.

THE COURT: No. The purchase money mortgage usually relates to a mortgage given back to the grantor. It is amortgage, but it is not a purchase money matter.

MR. SLAVIN: I saw a case about that one time. It is not important.

THE COURT: In any event--it is not very important, but I just want to clarify it, because it didn't appear to add up. Now, what about the paper that is recorded as a purchase-money second mortgage in which the mortgagee--

THE WITNESS: Miss Rose.

BY THE COURT:

Q Miss Rose?

A Yes.(p. 270) respondent- by Court

Q And that mortgage was made more than amonth after the property was conveyed?

A That's right.

Q Was that a purchase money mortgage?

A I don't believe it is a purchase money mortgage, but she gave us a loan.

THE COURT: All right.

MR. KAPLAN: I offer the Propsect Park West abstract, your Honor.

THE COURT: All right. Petitioner's Exhibit 31 in evidence.

(Same received in evidence and marked Petitioner's Exhibit 31.)

BY MR. KAPLAN:

Q Finally, Mr. Madera, did you deliver this letter dated December 10, 1970, to the Bar Association (handing)?

A I did.

MR. KAPLAN: I offer it.

THE COURT: What are you going to do with that abstract of title on 270?

MR. KAPLAN: I have done all I can with it, your Honor. There is little else I can do.

THE COURT: All right.

(p. 271) respondent-direct

MR. SLAVIN: I am going to object to that letter, your Honor. I see no purpose to that letter.

MR. SLAVIN: It is a statement of a legal position. Mr. Madera has now testified fully at this hearing, and he had the right to take a legal position before the Bar Association committee.

MR. KAPLAN: Well, it is already before the Appellate Division. He made a motion to refer it back to the grievance committee. I sent over the grievance committee minutes. The Appellate Division denied his motion. The reason I am offering it is just to make the record complete; that is all.

MR. SLAVIN: In this record I don't think it has any bearing, your Honor.

THE COURT: Well, it does, to this limited extent. The letter recites that the undersigned stipulates that the

foregoing statement of his motion may be made a part of the record of the proceedings before your committee, with the same force and effect as if the writer had personally appeared before your committee and had been questioned and had so answered.

MR. SLAVIN: But we are not now, your Honor-- (p. 272) respondent-direct if I may discuss the matter with you-- discussing the hearing at the committee.

The hearing at the committee was only to determine whether or not they should prefer charges so that we can proceed with this petition.

THE COURT: Well, it has a bearing only for the very limited--in relation to the charges of the degree of the respondent's cooperation with the grievance committee of the bar. You know that that is very often referred to in determinations by the Appellate

Division in disciplinary proceedings.

MR. SLAVIN: I understand that, sir.

THE COURT: So, it would have a bearing in that regard only.

MR. SLAVIN: From the record it indicates that he did cooperate. He answered every one of the charges. He never omitted doing that. At that time he took a legal position. Respondent has changed his position, as I indicated to the Court a few hearings ago, he would consider it, and we did agree to testify.

THE COURT: That's right. That was a matter that you said at that stage of the hearings that you didn't know whether he would claim his privilege and test it (p. 273) respondent
and then you came in after a recess and you advised the Court that he would not--

MR. SLAVIN: That's correct, because Mr. Madera and I discussed it, and after discussion--

THE COURT: Then, can we cover the point that Mr. Kaplan apparently has in mind, as I perceive it, and which does have some bearing, particularly since this has been before the Appellate Division, that in lieu of having this letter marked in evidence, that it be stipulated on this record that on December 10, 1970, the respondent, referring to Spivack against Klein, 385 U.S. 511, and the provisions of the Constitution, asserted his privilege and declined to answer questions.

MR. KAPLAN: He declined to appear, your Honor.

THE COURT: I gather from the tenor of this letter that this was by an understanding this would serve as a substitute for appearance, because the statement that is set forth in the letter, that this statement of position may be made part of the record of

transcript with the same force and effect as if the writer had personally appeared and had been so questioned and had so answered.

(p. 274) respondent

MR. KAPLAN: That was not any understanding he had with the petitioner; that was a unilateral understanding. He was subpoenaed, and he submitted that letter in lieu of his personal appearance in response to the subpoena.

THE COURT: In any event, the record will show that he was subpoenaed to appear before the grievance committee on December 10, and that he refused to do so asserting the claim of privilege, and citing Spivack against Klein.

MR. SLAVIN: On that I shall agree with you, sir.

THE COURT: And that, I think, will serve the purpose without the need of having the letter in the record, as to

FILE COPY

Supreme Court,
FILE
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1496

FRANK R. MADERA,

Petitioner,

v.

BROOKLYN BAR ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

MARSHALL G. KAPLAN
Attorney for Respondent
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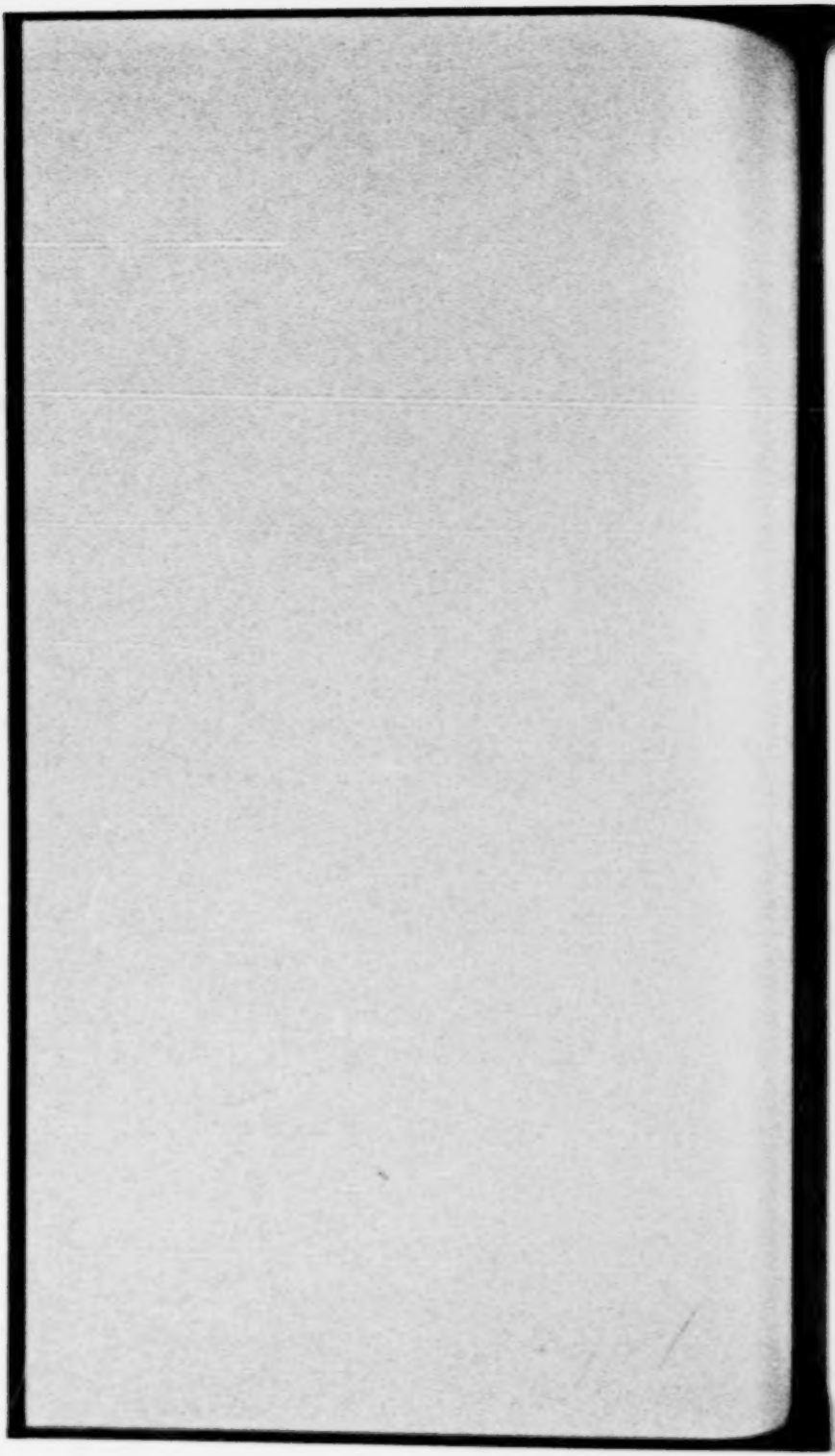
Brooklyn, New York 11201
212-855-7728

May 31, 1973.



IN THE

Supreme Court of the United States

October Term, 1972

No.

FRANK R. MADERA,

Petitioner,

v.

BROOKLYN BAR ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

The Facts

Petitioner, a member of the New York bar, was the subt of a disciplinary proceeding by petition (A22-33). e petition alleged that four different complainants had de complaints to Brooklyn Bar Association involving rious serious acts of professional misconduct by Frank Madera.

Through counsel, petitioner answered the petition (A37) d subsequently the issues tendered by the pleadings were ferred for a hearing. Petitioner appeared at the hearing th counsel and actively defended.

In order to sustain the petition, the respondent herein led various witnesses and introduced documentary evince. Finally, the petitioner was called as a witness in

chief with respect to only two of the complaints (A257). It was stated that if he were to assert his privilege then something else would have to be done to supply the missing testimony (A260-1).

What really amounts to the nub of the matter is that it became necessary to call petitioner because he himself had bought off the complainants by satisfying their complaints (A285-7). The problem thus presented, a circumstance favoring petitioner, was made plain by the referee's comments (A262-3) and was duly noted by the Appellate Division (A138).

In any event, Madera testified (A264, *et seq.*). He did not raise any claim of privilege and his testimony was in large measure exculpatory. As far as the referee was concerned, Madera helped himself as to all of the complaints except that made by Febos which was proven by independent testimony (A82-92).

Reasons for Denying the Writ

There just plainly is no substance to the petition. This was not a criminal proceeding. Petitioner had more due process than if he had been an accused felon. The Appellate Division clearly had jurisdiction over him and the statute (Judiciary Law, Sec. 90) was painstakingly observed.

The Appellate Division would have been justified in ordering Madera's disbarment on the basis of a finding that any one of the complaints was sustained. As above noted, petitioner's testimony applied to only two of the complaints.

The complaint that Madera was coerced into surrendering his Fifth Amendment rights finds absolutely no support in the record. In addition, Madera did not raise such a complaint before the Appellate Division. The referee's report was largely favorable to him. He moved to confirm all of it except as to that portion which found against him. Nowhere in his papers (A126-139) is there any contention that any person infringed on his constitutional rights. Indeed, he affirmed that the referee arrived at the proper conclusion as to those charges as to which Madera was called upon to testify (A128).

The rest of the petition is a melange of formless complaints buttressed by inapposite citations and much nit picking which scarcely rises to the level of constitutional concern. Thus, the argument that Madera's Fourteenth Amendment rights were violated seems to be directed to the length of the per curiam opinion of the Appellate Division and the clerical mechanism which gave it practical effect. Certainly he has been fully informed as to the specific findings which underlie the order of disbarment. There is no requirement that every last jot and tittle of the court's holding be spelled out in exquisite detail.

The invidious discrimination issue tendered relates to the workings of Brooklyn Bar Association in commencing a disciplinary proceeding. It should be noted that the "facts" asserted by petitioner in support of his contention are not a matter of record. The Association grievance committee did investigate, did give written notice and did hold hearings. Madera delivered a letter to the committee declining to testify after he had been served with a subpoena (A301-307). He did everything he could to hinder

the investigation and has been constantly complaining about his own conduct ever since.

The issue tendered as to the conduct of the grievance committee chairman in supervising Madera's restitution to his client of money owed by him is virtually incomprehensible. There was no settlement. Madera was required to disgorge what amounted to the fruits of a conversion. His ultimate compliance with the requirement did not clothe him with any due process rights or immunize him from the consequences of his wrongdoing.

CONCLUSION

There is no substance to the petition and it is respectfully prayed that it be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1972

No. 72-1496

FRANK R. MADERA,

Petitioner,

vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

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v.

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PETITIONER'S REPLY BRIEF

CONTRARY TO THE CONTENTION OF THE BAR ASSOCIATION THAT IT CALLED MADERA, AND HE TESTIFIED, CONCERNING ONLY TWO (2) OF THE SEVEN (7) COMPLAINTS OR CHARGES, THE ASSOCIATION CALLED MADERA, AND HE TESTIFIED, CONCERNING FOUR (4) OF THE COMPLAINTS

(replying to Bar Association's brief, pp. 1-2, and p. 2)

In an apparent effort to minimize the impact of the deprivation of Madera's

Fifth Amendment rights--which relate to four (4) of the seven (7) charges in the case--the Bar Association ("Association"), in its brief (pp. 1-2, and 2), states (a) that it called Madera as a witness in chief with respect to only two (2) of the seven (7) complaints, and (b) that his "testimony applied to only two of the complaints" (brief, p. 2)--meaning, presumably, the two complaints referred to above.

In support of its contention that it called Madera as a witness with respect to only two of the complaints, the Association cites p. A-257 of petitioner Madera's Appendix. In support of its claim that Madera's testimony applied to only two of the complaints--presumably, the two complaints referred to above--the Association, however, furnishes no supporting reference.

With respect to page A-257 of the Appendix, that portion of the record discloses that counsel for the Association, at the hearings before Mr. Justice Wegman, stated that he intended to call Madera as a witness in chief, on behalf of the Association, with respect to "the Sobral and Pedretti complaints." (SA-5 to SA-6).

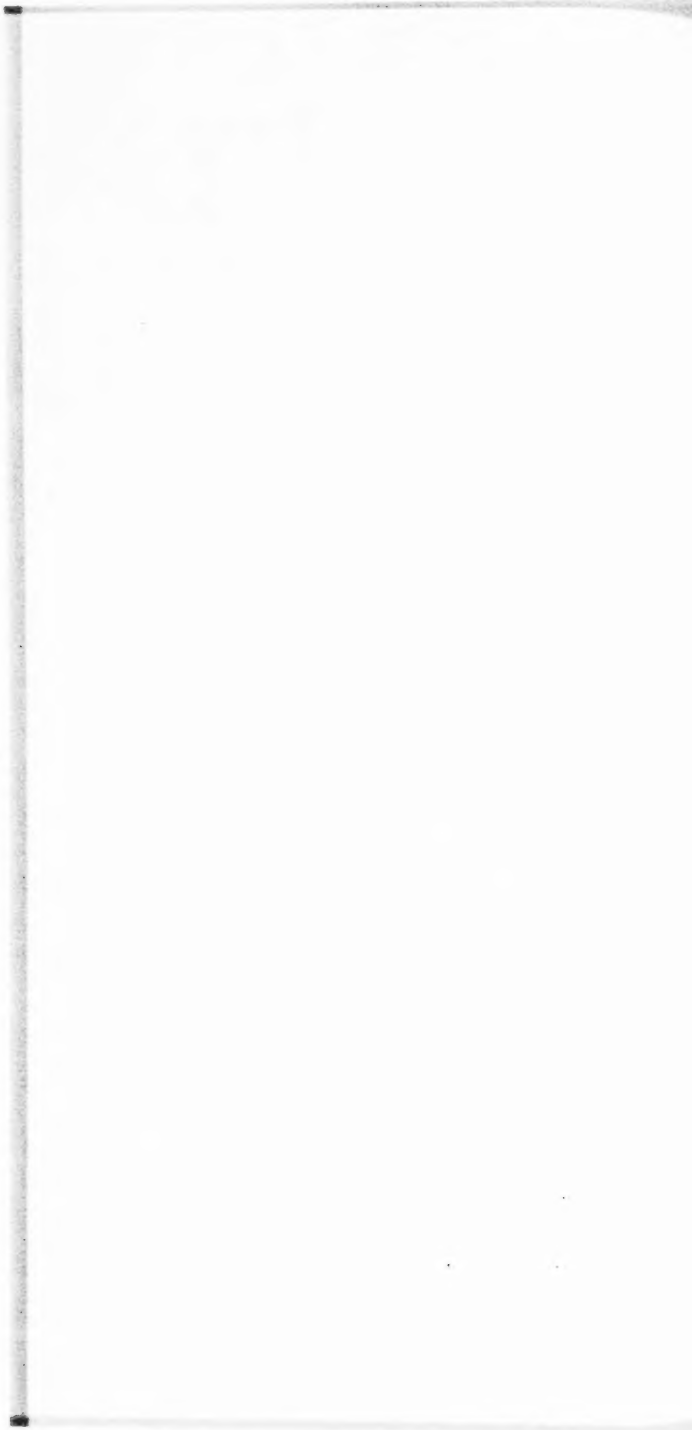
The "Sobral" complaints were three (3) in number (A-26 to A-29). The Association, however, presented evidence--with the exception of the evidence given by Madera as its witness--as to only one of these three complaints: namely, the one relating to a Myrtle Avenue property (petition herein, p. 20, footnote, item "(3)", cf. A-26 to A-27). It did not present evidence--except through Madera--as to two (2) of the three (3) complaints: i.e. the Bristol Street property complaint (A-26 to A-28), and the President Street property

complaint (A-28 to A-29). See petition herein, p. 30; cf. p. 20, footnote, ibid.

The Pedretti complaints were two (2) in number (A-29 to A-31). The Association did not present any evidence--except through Madera--as to either of these (petition herein, p. 31, to be read with p. 30).

Thus, it appears that the Association failed to present--except through Madera--any evidence as to four (4) of the seven (7) charges in the petition.

Accordingly, there is no merit to the claim of the Association that it called Madera as a witness in chief, and he testified, with respect to only two (2) of the seven (7) complaints. The fact is that it called him and he testified concerning four (4) complaints.



THE BAR ASSOCIATION'S GROUNDLESS CLAIM THAT IT HAD NOT PRODUCED EVIDENCE CONCERNING CERTAIN CHARGES AND HAD HAD TO CALL MADERA TO SUPPLY SAID EVIDENCE, BECAUSE HE HAD BROUGHT ABOUT THE NON-APPEARANCE OF THE COMPLAINANTS WHO MADE SAID CHARGES

(replying to the Bar Association's brief, p. 2)

In an apparent effort to refute the showing in the petition herein that Madera testified for the Association under constraint of Mr. Justice Wegman's ruling and clearly implied threat that if Madera invoked the Fifth Amendment and refused to testify, Mr. Justice Wegman would find him guilty of the four (4) charges as to which the Association desired to call him as a witness (and as to which no evidence had been introduced), the Association, in its brief (p. 2), states that

"...it became necessary to call petitioner because he himself had bought off the complainants by satisfying their complaints (A 285-7)", by making restitution, and had thus, presumably, brought about their non-appearance.

The Association's claim is contrary to the facts, and is, moreover, wholly incompatible with another contention made by the Association in its brief before this Court, to the effect that Madera was required to make restitution (brief, p. 4). The facts are these:

(1) At the hearings before Mr. Justice Wegman, counsel for the Association stated in open court that he was not claiming either (a) that the non-appearance of the two complainants (Sobral and Pedretti), concerning whose charges (four in number) the Association had presented no evidence, was due to anything

specific Madera had done, or that Madera had done anything improper in any respect in contacting the complainants since the inception of the proceedings (SA -2 to SA-3).* During these contacts, Madera had apparently made restitution to the complainants (A-285 to A-287; A-138). As already noted, the Association, in its brief before this Court, states that Madera was required to make said restitution (brief, p. 4).

(2) Mr. Justice Wegman, at the hearings before him, agreed with the statement of Madera's counsel that there was nothing wrong in Madera's talking to the complainants (since the inception of the proceedings), and, in fact, went on to say that

---

*Numbers, preceded by "SA", refer to pages of petitioner's Supplemental Appendix annexed hereto.

"...there would be something wrong if he didn't" (SA - 4).

(3) The Association's charge that the non-appearance of the complainants Sobral and Pedretti had been due to the fact that Madera had "bought off" the complainants by satisfying their complaints (by making restitution), is, as already indicated, completely inconsistent with its position presented elsewhere in its brief before this Court, that Madera was required to make such restitution (brief, p. 4).

(4) The non-appearance of the complainants Sobral and Pedretti, as the Bar Association acknowledged at the hearings, was not due to any improper conduct on the part of Madera, but was the result of the Association's failure to compel said appearance by subpoena (SA - 3 ; A-259 to A-260; See Spevack v. Klein, 385 U.S. 511).

It thus appears that there is no merit to the Association's contention thatit was compelled to call Madera because he had "bought off" the complainants by satisfying their complaints (by making restitution). Indeed, as noted, the contention is completely at variance with contrary positions taken by the Association at the hearing, as well as Mr. Justice Wegman's comments, and is also inconsistent with the Association's position in its brief before this Court.

THE BAR ASSOCIATION'S GROUNDLESS CONTENTION THAT THE DEPRIVATION OF MADERA'S FIFTH AMENDMENT RIGHTS WAS CURED BY THE FACT THAT MR. JUSTICE WEGMAN--WHO, INCIDENTALLY, ACTED AS A REFEREE TO HEAR AND REPORT ONLY-- HAD FOUND IN MADERA'S FAVOR ON THE "FIFTH AMENDMENT" CHARGES

(replying to the Association's brief, p. 2)

In its brief (pp. 2 and 3), the Bar

Association argues--at least inferentially--that any deprivation of Madera's Fifth Amendment rights was in fact nullified by the fact that Mr. Justice Wegman subsequently found in Madera's favor on the charges as to which Madera testified as a witness in chief for the Association (under constraint of Mr. Justice Wegman's ruling concerning the Fith Amendment).

The argument is without merit in view of the fact that Mr. Justice Wegman was acting as a referee to hear and report only (A-74 to A-75, A-78), and the Appellate Division--which had the power to accept or reject Mr. Justice Wegman's findings and report, and rejected the latter's findings and report as to said "Fifth Amendment" charges--based its order of disbarment, in material part, upon the evidence Madera gave as to said charges--the only evidence on said charges. This is

shown by the fact that the Appellate Division found Madera guilty of said charges (as well as the other charges), and directed his disbarment because of his guilt of said (and the other) charges. (A-143 to A-145; cf. Association's petition, A-25 to A-33).

CONTRARY TO THE BAR ASSOCIATION'S CONTENTION, THE FIFTH AMENDMENT QUESTION WAS SEASONABLY RAISED IN ACCORDANCE WITH NEW YORK PRACTICE

(replying to Bar Association's brief, p. 3)

In its brief, the Association states (p. 3), in reference to Madera's papers:

> "Nowhere in his papers (A 126-139) is there any contention that any person infringed on his constitutional rights". (brief, p. 3).

The pages referred to--namely, A 126-139--constitute, together with A-125, Madera's statement in support of his cross-motion, made in the Appellate Division, to confirm

Mr. Justice Wegman's report insofar as it found six (6) charges--including the four (4) as to which Madera testified for the Association--not to have been sustained, and to disaffirm the report insofar as it found one of the charges to have been sustained.

While Madera, in said statement, did not raise the Fifth Amendment issue, the issue was, however, as pointed out in the petition herein (pp. 38-40), asserted (a) at the hearings before Mr. Justice Wegman, and there by Mr. Justice Wegman, as well as counsel for both sides, (b) on Madera's motion in the Appellate Division to vacate the order of disbarment, (c) on Madera's motion in the Appellate Division for leave to appeal to the Court of Appeals from the order of disbarment, and (d) on Madera's appeal to the Court of Appeals from the order of disbarment taken as of right, on constitutional questions.

In connection with Madera's motion in the Appellate Division to vacate the order of disbarment, it should be noted that the Court of Appeals of the State of New York holds that a constitutional question has been properly and timely raised if it is asserted--as it was in the case at bar--on a motion made in the Appellate Division--after a final determination by said court--to vacate said determination. Matter of Department of Public Parks, 85 N.Y. 459, 464, cited, Cohen & Karger, Powers of the New York Court of Appeals (rev. ed., 1952), sec. 169, p. 642, note 56.

THE FULL EXTENT (NOT REFERRED TO IN THE PETITION HEREIN) OF THE COERCIVE IMPACT UPON MADERA OF MR. JUSTICE WEGMAN'S RULING AND CLEARLY IMPLIED THREAT CONCERNING THE EFFECT THAT SAID JUSTICE WOULD GIVE TO ANY INVOCATION BY MADERA OF THE FIFTH AMENDMENT

So coercive was the impact upon Madera of Mr. Justice Wegman's ruling and clearly implied threat that if Madera invoked the Fifth Amendment and remained silent as to the charges concerning which the Association called him as a witness, said Justice would find him guilty of said charges, that Madera not only relinquished his right to remain silent and testified for the Association, but, in addition, after doing so, he tried -- unsuccessfully--to have excluded from evidence

the fact that he had, prior to the hearings before Mr. Justice Wegman, in proceedings before the Bar Association concerning said (and other) charges, invoked the Fifth Amendment and remained silent. (A-301 to A-307, to be read with A-8 to A-19). More particularly, after Madera had decided not to assert his Fifth Amendment privilege to remain silent, and had testified for the Association, the latter offered in evidence the letter which Madera had written (A-14 to A-19) in response to the Association's notice of meeting (A-8 to A-11) and subpoena (A-12 to A-13) concerning the charges as to which he had just testified, as well as other charges (A-301).

The unmistakable purpose of the offer was to prejudice Madera before Mr. Justice Wegman by showing that, notwithstanding Madera's decision not to invoke the Fifth

Amendment at the hearings before Mr. Justice Wegman and his testifying for the Association, nevertheless, Madera had failed to cooperate with the Association by declining to appear at the Association's meeting, but, instead, had transmitted to it a letter stating (A-305 to A-306) that he invoked the Fifth Amendment under Spevack v. Klein, supra, in lieu of appearing (A-305, to be read with A-302 to A-305).

Madera's counsel objected to the admission of the letter (A-302, A-303), pointing out that Madera had, at the hearings before Mr. Justice Wegman, testified as to the charges (A-304) (albeit as a witness for the Association, under constraint of Mr. Justice Wegman's ruling and clearly implied threat to find Madera guilty if he asserted the privilege of the Fifth Amendment and reamined silent.)*

*footnote on next page

*Subsequently, Mr. Justice Wegman, while not admitting the letter in evidence, did, however, rule that the record would show that Madera had been subpoenaed to appear before the Association's grievance committee, but had refused to do so, asserting, instead, the claim of privilege (under the Fifth Amendment) in accordance with Spevack v. Klein, supra (A-306).

Clearly, the objection of Madera's counsel to the admission of Madera's Fifth Amendment letter was prompted by the fear that, notwithstanding the fact that Madera had not invoked the Fifth Amendment at the hearings, but had, instead, testified for the Association, Mr. Justice Wegman might, in his findings and report as to Madera's guilt of the charges as to which the Association called Madera as a witness, take into consideration the fact that Madera had previously failed to cooperate with the Association, by invoking said Amendment and remaining silent.

The foregoing vividly demonstrates the full extent of the coercive impact upon Madera of Mr. Justice Wegman's Fifth Amendment ruling and threat.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

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June 12, 1973.

SUPPLEMENTAL APPENDIX

(p. 98) THE COURT: I know, but I have no idea what it is that Mr. Kaplan has in mind. He may have a very specific purpose in wanting to call the respondent at this particular point rather than to wait until the other witnesses have testified. I don't know and I don't intend to ask him to inform me privately about it because I don't believe in an adversary proceeding that would be proper.

MR. KAPLAN: I have no objection to telling the reason, your Honor, and I have no objection to telling your Honor what I have in mind. I don't know if Mr. Slavin would like it if I do it, but I will be glad to tell you if you want to hear it.

THE COURT: I don't know if Mr. Slavin will like or dislike anything you say, but

I am sure that Mr. Slavin knows there isn't anything a counsel can say in a proceeding (p. 99) of this nature that would have any prejudice or effect. If there were a jury here, it would be one thing, but I assure you the Court would not be influenced by any statement that was regarded by the other side as an improper statement.

MR. KAPLAN: Judge, I think I should tell you then that I have got two missing witnesses, Sobral and Pedredi. I spoke to Mrs. Sobral last night and I spoke to Mr. Pedredi this morning. Now, to be as precise as possible, I don't want to convey to you anything Mr. Madera has done has resulted specifically in these witnesses failing to appear. However, I do know that he has been in contact with them since the inception of the proceeding, and the contact he has had with them has resulted in a non-appearance in some general way. I am not saying anything

he has done has been improper in any respect in connection with his contact with them. Both of them promised me they would be here. Neither of them kept their commitment. If it is going to come to that, I am going to have to ask the Court's help in getting warrants of arrest.

(p. 100) THE COURT: Did you serve a subpoena?

MR. KAPLAN: I didn't serve them. Both of them gave me their commitment, and in an effort to get to some point where this proceeding is going to terminate, and rather than serve subpoenas, which I have to get the Appellate Division to issue, and ask the Appellate Division to order warrants of arrest, or something of that nature--I am trying to provide the missing testimony through the respondent in the interest of conserving the time that would otherwise be involved, and that's the reason why I am calling the respondent.

THE COURT: Mr. Slavin, I would like to have you tell me whether your client, the respondent, has had any communication, directly or indirectly, with or from either of these two individuals since yesterday?

MR. SLAVIN: Since yesterday? No.

MR. KAPLAN: I don't say that he has spoken to them since yesterday. He has, however, spoken to them since the inception of this proceeding.

MR. SLAVIN: There is nothing wrong with a man--

(p. 101) MR. KAPLAN: I don't say there is anything wrong with it. I don't charge him with anything.

MR. SLAVIN: Mr. Kaplan, and I say Jerry, because you are a friend of mine, I can tell you there is nothing wrong with the respondent talking with people--

THE COURT: Of course there isn't. There would be something wrong if he didn't.

MR. SLAVIN: That's correct, sir.

THE COURT: But the point is that the witnesses who assured Mr. Kaplan they would be here are not here and their absence--

MR. SLAVIN: If your Honor wishes, I will ask Mr. Madera now under oath to state to you--

THE COURT: That's unnecessary. He has stated he has no communication with them or from them since yesterday, so that eliminates anything as to his being able to offer any reason that he might know for their failure to appear. He knows there is no reason why they didn't appear, since he didn't hear from them since yesterday.

MR. KAPLAN: I intend to call him. If he is going to assert his privilege on the Fifth Amendment, (p. 102) it's then going to become necessary for me to do something else to provide the gap in the testimony.

I intend to call him as a witness in chief on behalf of the petitioner with respect to the Sobral and Pedredi complaints.